TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 257.

HARRIET A. BARLOW, PLAINTIFF IN ERROR,

vs.

NORTHERN PACIFIC RAILWAY COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NORTH DAKOTA.

FILED OCTOBER 1, 1914.

(24,386)

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a STATE OF NORTH DAKOTA,
In the Supreme Court, ss:

To the Honorable the Supreme Court of the United States:

Pursuant to the foregoing Writ of Error and original citation in a cause now pending in the Supreme Court of the State of North Dakota between the Northern Pacific Railway Company, plaintiff, and Harriet A. Barlow, defendant, I, R. D. Hoskins, Clerk of the Supreme Court of the State of North Dakota, do hereby certify and return:

That the annexed transcript, numbered from pages one (1) to one hundred and eighty (180) inclusive, constitute the complete record on appeal to the Supreme Court of the State of North Dakota and all the proceedings had in the said Supreme Court of North Dakota on said appeal, including the orders and opinion of the Court and the said following transcript contains the entire record and proceedings had in the Supreme Court of the State of North Dakota and the same are hereby returned to the Supreme Court of the United States pursuant to said Writ of Error.

In testimony whereof, I have hereunto set my hand and affixed the seal of the Supreme Court of North Dakota, at Bismarck, this 22d day of August, A. D. 1914.

[Seal Supreme Court, State of North Dakota.]

R. D. HOSKINS,
Clerk of the Supreme Court, State of North Dakota.

b

Writ of Error.

The President of the United States of America to the Honorable Judges of the Supreme Court of the State of North Dakota, Greeting:

Because that in the records and proceedings, as also in the rendition of the judgment, of a plea which is in said court before you, or some of you, your court being the highest court of law or equity in said state in which a decision could be had in a suit between Northern Pacific Railway Company, plaintiff and Harriet A. Barlow, defendant, wherein was drawn in question the proper construction of certain acts of Congress and statutes of the United States, to-wit:— Section 2257 and to and including section 2274, Revised Statutes of the United States being those Laws of the United States providing for and allowing pre-emption by settlers of the public lands of the United States together with Acts of Congress supplementary and amendatory thereto, particularly an Act of Congress approved May 4th, 1880, entitled An Act for the Relief of Settlers on Public Lands; and also an Act of Congress dated March 3rd, 1875, entitled An Act granting to Railroads the Right of Way through the Public Lands

of the United States; and that the decision and judgment of the Supreme Court of North Dakota is contrary to the provisions of said Statutes and Acts of Congress and against the right, title and privilege set up and claimed by said defendant under said Acts of Congress, laws and statutes, and there being manifest error in said decision greatly to the damage of Harriet A. Barlow, the petitioner in error, and we, being willing that if there is error it should be duly corrected, we do therefore command you, if judgment be therein given, that, under the seal of your court you send the record and proceedings had in said cause to the Supreme Court of the United States
c together with this Writ so that you have the same at Washington on the first day of the next term of said court, that the records and proceedings aforesaid being inspected the said Supreme Court of the United States may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness: The Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, this 18" day of June, A. D. 1914.

[Seal United States District Court, North Dakota.]

J. A. MONTGOMERY,
Clerk District Court of the United States,
for the District of North Dakota.

For good cause shown, I extend the time in which return can be made to the above writ of error up to and including Sept. 1st, 1914.

B. F. SPALDING,
Chief Justice Supreme Court, State of North Dakota.

d [Endorsed:] 4. State of North Dakota. In Supreme Court — County. Northern Pacific Ry. Co., Respondent & Plaintiff, vs. Harriet A. Barlow, Appellant & Defendant. Writ of Error. Service of the within — is hereby admitted this — day of ——, 191–, at ——, North Dakota. —— ——, Attorney for —— ——. S. E. Ellsworth, Jamestown N. D., Attorney for —— ——. 2436. Filed in the Office of the Clerk of the Supreme Court. Jun- 20, 1914. State of North Dakota. R. D. Hoskins, Clerk.

e UNITED STATES OF AMERICA:

Supreme Court of the United States, October Term, 1914.

Citation.

The President of the United States to Northern Pacific Railway Company, a corporation, Greeting:

You are hereby cited and admonished to be and appear before the Supreme Court of the United States at the City of Washington, D. C. within sixty days from the date of this Citation, pursuant to the Writ of Error filed in the Clerk's office of the Supreme Court of the State of North Dakota, wherein Harriet A. Barlow is plaintiff in

error and you, said Northern Pacific Railway Company is defendant in error, to show cause if any there be, why the judgment rendered against said plaintiff in error, as in said Writ of Error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, this 20th day of June, A. D. 1914.

BURLEIGH F. SPALDING,
Chief Justice of the Supreme Court of the State of North Dakota.

Admission of Service.

Personal service of the above and foregoing Citation and the delivery of a copy thereof

Is hereby acknowledged this 24th day of June, A. D. 1914 at Fargo, North Dakota.

WATSON & YOUNG,
Attorneys for Northern Pacific Ry. Co., Defendant in Error, Fargo, N. Dak.

f [Endorsed:] 5. Supreme Court of the United States. Northern Pacific Ry. Co., Defendant in Error, vs. Harriet A. Barlow, Plaintiff in Error. Citation. Filed in the Office of the Clerk of the Supreme Court, Jul- 7, 1914. State of North Dakota. R. D. Hoskins, Clerk.

1 On the 5th day of September, A. D. 1912 there was filed in this Court, on appeal from the District Court of Foster County, North Dakota, a record on appeal, which record is in words and figures as following, to-wit:

STATE OF NORTH DAKOTA,
County of Foster, ss:

In District Court, Fifth Judicial District.

NORTHERN PACIFIC RAILWAY COMPANY, Plaintiff,
vs.
HARRIET A. BARLOW, Defendant.

Summons.

The State of North Dakota to the above named defendant:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer upon the subscribers within thirty days after the service of this summons upon you, exclusive of the day of service; and in case of your failure to appear or answer,

judgment will be taken against you by default for the relief demanded in the complaint.

Dated September 6th, 1902.

BALL, WATSON & MACLAY,
Attorneys for Plaintiff, Office and P. O. Address, Stern Block, Fargo, North Dakota.

2 STATE OF NORTH DAKOTA,
County of Foster, ss:

In District Court, Fifth Judicial District.

NORTHERN PACIFIC RAILWAY COMPANY, Plaintiff,
vs.
HARRIET A. BARLOW, Defendant.

Complaint.

The plaintiff complains and alleges the following facts:

I.

That the plaintiff is a corporation duly created and organized under the laws of the State of Wisconsin, and engaged in owning and operating lines of railroad in this state, under and pursuant to the laws of North Dakota. That plaintiff owns and operates a line of railroad through, over and across the Southwest Quarter, (S. W. ¼) of Section Six, (6), Township One Hundred and Forty-seven, (147) of Range Sixty six, (66), in said County of Foster, North Dakota.

II.

That plaintiff has an estate in, and is the owner of a right-of-way for railroad purposes, of a strip of land two hundred (200) feet in width, that is to say, one hundred (100) feet on each side of the center line of said railroad, as the same has been heretofore constructed and is now in operation over and across the tract of land hereinbefore described.

III.

That defendant claims some estate or interest in said strip hereinbefore described, and wrongfully and unlawfully withholds possession of a portion thereof from plaintiff.

Wherefore, plaintiff prays 1st.—That defendant be required to set forth all his claims to the property above described, and that the validity, superiority and priority thereof be determined:. 2nd.—
That the same be adjudged null and void, and that defendant
3 be decreed to have no estate in, or lien or encumbrance upon said property. 3rd.—That plaintiff's title be quieted as to

such claim, and that defendant be forever debarred and enjoined from further asserting the same. 4th.—That plaintiff recover possession of so much of said premises as is now in the possession of defendant. 5th.—That plaintiff have such other general relief as may be just, together with costs and disbursements.

BALL, WATSON & MACLAY,
Attorneys for Plaintiff.

STATE OF NORTH DAKOTA,
County of Cass, ss:

Jno. S. Watson being first duly sworn on his oath says he is a member of the firm of Ball, Watson & Maclay, attorneys for the plaintiff in the above entitled action; that he has read the foregoing complaint, and that the same is true to his best knowledge, information and belief.

JNO. S. WATSON.

Subscribed and sworn to before me this 6th day of September, 1902.

MARTHA NYMON,
Notary Public, Cass County,
North Dakota. [SEAL.]

My commission expires Nov. 9th, 1903.

4 STATE OF NORTH DAKOTA,
County of Foster, ss:

In District Court, Fifth Judicial District.

NORTHERN PACIFIC RAILWAY COMPANY, Plaintiff,
vs.
HARRIET A. BARLOW, Defendant.

Answer.

The defendant above named for answer to plaintiff's complaint herein respectfully shows the court:

I.

She admits that plaintiff is a corporation substantially as alleged in Paragraph I of its complaint. She further admits that plaintiff operates a line of railroad over and across the land described in said complaint.

II.

She specifically denies that plaintiff is the owner of or has any interest or estate whatever in a right-af-way for railroad purposes of a strip of land 200 feet in width over and across said land as described in Paragraph II of said complaint. She denies that plaintiff has any interest, estate or title to or in said land and premises or any part of the same.

III.

Defendant admits that she claims an estate in said land and every part thereof including the strip 200 feet in width over and across the same as described in Paragraph II of plaintiff's complaint; and in that behalf alleges that she is the widow, sole heir and devisee of Frederick G. Barlow, now deceased. That at the time of his death, said Frederick G. Barlow was the owner in absolute fee simple, under grant or patent from the United States of the whole of said land, without reservation of said strip 200 feet in width or of any other part or parcel thereof for the purpose of a right-of-way or of any purpose whatever; and that the full interest, estate and title of said Frederick G. Barlow in and to said land is now owned and held by this defendant and is prior and superior to that of plaintiff.

IV.

Further answering, defendant denies each and every allegation in said complaint contained not hereinbefore, admitted, qualified or explained.

As a counterclaim to plaintiff's cause of action, defendant alleges:

I.

On and prior to the 22nd day of July, A. D., 1883, the said land in said complaint described, towit:—Southwest quarter (SW¼) of section six (6) in township one hundred and forty seven (147) north, of range sixty six (66), west of the fifth principal meridian, was unsurveyed public land of the United States, agricultural in character, not reserved from sale and subject to settlement under the pre-emption law of the United States then in force. On said 22nd day of July, A. D. 1883, Frederick G. Barlow was a citizen of the United States over the age of twenty one years, had never had the benefit of the pre-emption laws of the United States, was not the proprietor of 320 acres of land in any state or territory, had not quit or abandoned his own land or his residence thereon, to reside on the said land above described and was, in all respects, legally qualified to initiate proceedings under the pre-emption laws of the United States to obtain title to 160 acres of agricultural land from the public lands in the United States.

II.

On said 22nd day of July, A. D. 1883, intending to make entry of the said land hereinbefore described when the same was surveyed, and to acquire title to the same by virtue of compliance with the pre-emption laws of the United States, said Frederick G. Barlow settled upon said land and took up his residence thereon. At the time of such settlement there was not a railroad track, road bed or grade constructed over or across said land nor was there on file with the register of the United States district land office at Fargo, the district in which said land was situated

a plat or profile of a section of railroad extending over or across said land or any part of the same. From the date of his said settlement, said Frederick G. Barlow continuously resided on said land and made the same his home and cultivated and improved the same until a survey thereof was made; and on the 8th day of October, A. D. 1884, and within ninety days after the receipt at said district land office of the approved plat of the township embracing this said pre-emption settlement, said Frederick G. Barlow filed with the register of said land office at Fargo, a written statement describing the said land so settled upon by him and declaring his intention to claim the same according to the pre-emption laws, alleging settlement upon said tract upon the 22nd day of July, A. D. 1883, as aforesaid.

III.

Thereafter, having continued his residence upon and improvement of said land, according to law, on or about the 6th day of July, A. D. 1885, after due notice of his intention so to do, said Frederick G. Barlow made final proof of his entry, settlement, residence upon and improvement of said land as aforesaid and the payment required by law and submitted the same to the register and receiver of said district land office at Fargo; and on said 6th day of July, A. D. 1885, received from said district land office a final certificate of entry of said land. Thereafter, pursuant to the said settlement, entry and proof of said Frederick G. Barlow upon said land, there was issued and delivered to him by the Government of the United States, a patent dated November 7th, A. D. 1888, granting and conveying to him in absolute fee simple the said land by the description hereinbefore given without limit or reservation of any kind whatever.

7

IV.

Said Frederick G. Barlow continued to hold the said land under the grant and title thereto acquired by him as hereinbefore set forth until the time of his death in or about the year 1901; at which time he was occupying said land as a homestead under the law of this state. This defendant is the widow and sole heir and devisee of said Frederick G. Barlow and is holding and occupying said land as her homestead and is invested with all estate and title thereto acquired and held by said Frederick G. Barlow at the time of his decease. The estate and interest claimed by the plaintiff herein to a strip of land 200 feet in width over and across said land, as appears from his complaint, is adverse to the title and interest of defendant.

Wherefore, this defendant prays judgment:

(1) That the claim of plaintiff be adjudged null and void and that it be decreed to have no estate, interest or title in or to said land or any part or parcel of the same.

(2) That the title of defendant be quieted as to such claim and that plaintiff be forever debarred and enjoined from further asserting the same.

(3) That this defendant have such other general relief as may be just together with her costs and disbursements.

S. E. ELLSWORTH,
Attorney for Plaintiff,
Jamestown, North Dakota.

STATE OF NORTH DAKOTA,
County of Stutsman, ss:

S. E. Ellsworth being first duly sworn upon his oath deposes and says that he is attorney for the defendant above named; that he has prepared the above and foregoing answer and knows the contents thereof and that the same is true to his best knowledge, information and belief.

A. E. ELLSWORTH.

Subscribed and sworn to before me this 1st day of November, 1902.
[L. S.]
MICHAEL MURPHY,
Notary Public, Stutsman Co.,
North Dakota.

My commission expires 2/7/07.

8 STATE OF NORTH DAKOTA,
County of Foster, ss:

In District Court, Fifth Judicial District.

NORTHERN PACIFIC RAILWAY COMPANY, Plaintiff,
vs.
HARRIET A. BARLOW, Defendant.

Judge's Certificate to Statement of the Case.

Application being made, upon due notice this 7th day of November, A. D. 1908, to the undersigned as Judge of the District Court in and for the Fifth Judicial District of the State of North Dakota, and the Judge by and before whom the above entitled action was heard, tried, and determined, by the defendant above named, for settlement and allowance of the Proposed Statement of the Case herein,

And it now, and hereupon appearing that the said Proposed Statement was prepared by the attorney for said defendant and by him served upon the attorneys for plaintiff herein, within the time provided by law for the preparation and service of said Proposed Statement of the Case; and it further appearing that more than twenty days have elapsed since the service of said Proposed Statement of the Case, as aforesaid and that no amendment or amendments to said Proposed Statement have been proposed by said attorneys for plaintiff and served upon said attorney for defendant; other than the specification of amendment hereunto attached; and that all amendments so proposed by counsel for plaintiff have been incorporated in said proposed Statement of the case.

COPY BOUND CL

And it now appearing, that the said Proposed Statement of the case contains a complete and literal transcript of all stipulations of counsel, depositions used upon the trial of said case, the stenographer's minutes of all evidence offered and had on the trial and proceedings of said cause, all evidence used by either party, all
Plaintiff's motions to set aside the Judgment herein, all
9 motions made, the orders and rulings of the court thereon,
and all exceptions taken thereto by either party; and that there is attached to said Proposed Statement of the Case all exhibits offered in evidence at said trial.

Now therefore, having examined the said Proposed Statement of the Case, prepared, served and submitted for settlement as aforesaid, and it appearing that this application by said attorney for the defendant for settlement and allowance of said Proposed Statement of the Case, is made within the time provided by law for making such applications, and having found the same conformable to the truth and to contain a true statement of all proceedings had, evidence taken, exhibits offered and evidence offered on the trial of said action and in the subsequent proceedings had, for the purpose of setting aside the Judgment therein,

I do hereby certify, that the said Proposed Statement of the Case prepared, served and submitted by the attorney for the defendant as aforesaid, is a true and correct Statement of the Case of the above entitled action, and of all proceedings leading up to and connected with the Order appealed from by the Defendant, and contains a true account of all evidence and proceedings had upon said trial and upon said motion, including all objections, motions and rulings of the court thereon, and exceptions taken by the counsel thereto, and that the papers attached to the said Proposed Statement of the Case and marked respectively "1", "2", "4", "5" and "6" are the original exhibits and all the original exhibits offered upon the trial of said cause and referred to in the stenographer's minutes as so marked therein.

It is therefore ordered, that the said Proposed Statement of the Case be and the same is hereby settled and allowed and declared to be a part of the record of said action.

Dated, Valley City, North Dakota, this 7th day of November, A. D. 1908.

By the Court.

EDWARD T. BURKE,
Judge of the District Court.

CLOSE IN CENTER

10 STATE OF NORTH DAKOTA,
County of Foster, ss:

In District Court, Fifth Judicial District.

NORTHERN PACIFIC RAILWAY COMPANY, Plaintiff,
vs.
HARRIET A. BARLOW, Defendant.

Statement of the Case.

Be it remembered, that the above entitled action came regularly on to be heard at a special term of the District Court aforesaid, held in and for the County of Foster, State of North Dakota, on the 17th day of March, A. D. 1908, and was tried by the court without a jury, the plaintiff appearing by T. F. McCue, its attorney and the defendant appearing by S. E. Ellsworth, her attorney. Thereupon, the following proceedings were had:—

A Stipulation of Fact was made, entered into by counsel for plaintiff and defendant and duly presented to the court, upon said trial, which stipulation is in words as follows towit:

Stipulation of Fact.

(Venue and Title as Above.)

The following facts are hereby stipulated to be true:

1st. That at all times since the 17th day of September, A. D. 1881, the Jamestown and Northern Railroad Company was, and now is, a railroad corporation, organized under and existing by virtue of the laws of the Territory of Dakota, now State of North Dakota and chartered to build a line of railroad from Jamestown, N. D. in a northwesterly direction through Stutsman, Foster, Eddy and Benson Counties to the west end of Devils Lake. After its organization as aforesaid, the said Jamestown and Northern Railroad Company authorized and directed the survey of a line of route for a railroad from a point near the City of Jamestown, in a northwesterly direction through the Counties of Stutsman and Foster, in said Territory of Dakota; said survey was commenced on the 1st day of September, 1881, and completed on the 30th day of
11 October, 1881, and in its course passed across the land described in the complaint herein. A map or plat representing such survey was prepared, and on the 5th day of October, 1882, said Company by resolution of its board of directors adopted said line of route so surveyed and as represented on said map as the definite location of a section of its line of route between the points mentioned.

2nd. Thereafter said Jamestown & Northern Railroad Company transmitted to the Secretary of the Interior a copy of its articles of incorporation, certified by the Secretary of Dakota Territory; also a certificate of its organization, under the laws of the said Territory

of Dakota, made by its secretary, and an affidavit of its president, designating the officers of said corporation, all of which papers were received in the Department of the Interior on January 26, 1883.

3rd. The land in controversy in this action is situated in the land district of the United States Land Office at Fargo, and has been so situated at all times. On June 7th, 1893, the records of the United States Land Office at Fargo, North Dakota, were destroyed by fire. At this time the records of the Land Office do not contain any profile or map of plaintiff's railroad over the land in question. Tract Book No. 15, of said Land Office, is a copy of the Original Tract Book which was destroyed by fire on June 7th, 1893, which said copy now contained in the Land Office at Fargo, was furnished to said office by the General Land Office of the United States, and was made up from the records there kept. Upon such tract Book No. 15, and in the plat therein contained relating to Township 147, Range 66, there is traced across said plat in red ink marking, a line extending through said township, which line running upon said course, bears small cross marks such as is generally used in map making to indicate a railroad, and which line also has connected with it in red ink the words "Jamestown Northern," with a red ink arrow pointing north parallel with said line. In the same tract book No. 15, the other plats of township both north and south of the one last referred to, are found similar lines with similar markings, and it all put together shows a continuous line
12 of something apparently indicating a railroad and which is called "Jamestown Northern." In the operation of United States Land Offices, all original documents such as homestead entries and homestead and pre-emption proofs, are regularly forwarded by the local land office to the general land office at Washington, where the same are kept as original records.

A profile and map were made containing the following endorsements and no others namely: "Part of map of Definite location of Jamestown and Northern Railroad from Junction with Northern Pacific Railroad to north line of Foster County, Dakota Territory, Brainerd, December 30th, 1882. P. H."

STATE OF MINNESOTA,
County of Crow Wing, ss:

A. Anderson, of Brainerd, in said county and state, being duly sworn says that he is the engineer in chief of the Jamestown and Northern Railroad Company; that the survey of the line of route of said road from its junction with the Northern Pacific Railroad, to the north line of Foster County, and Territory of Dakota, was made under his direction as engineer in chief of the Company, and under its authority, commencing the 1st day of September, 1881, and ending on the 30th day of October, 1881, and that such survey is accurately represented on the accompanying map.

A. ANDERSON,
Engineer in Chief.

Subscribed and sworn to before me this 28th day of December, 1882.

RICH RELF,
Notary Public.

I, George Adams, do hereby certify that I am the president of the Jamestown and Northern Railroad Company; that A. Anderson, of Brainerd, who subscribed the foregoing affidavit, is the chief engineer of the company; that the survey of the line of route of the company's road as accurately represented on this map, was adopted by the company by resolution of its board of directors, on
13 the 5th day of October, 1882, as the definite location of the road, from its junction with the Northern Pacific Railroad, to the north line of Foster County, in Dakota Territory, and that the map has been prepared to be filed for the approval of the Secretary of the Interior in order that the Company may obtain the benefit of the act of Congress, approved March 3rd, 1875, entitled, "An Act granting to railroads the right of way through the public lands of the United States."

GEO. H. ADAMS,
President of the Jamestown and Northern Railroad Company.

Attest:
SIDNEY STARBUCK,
[SEAL.] *Secretary.*

Z. B. S., Department of the Interior, June 26, 1883. J. K. McC. Approved subject to any existing rights of the Northern Pacific Railroad Company.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., April 29, 1897.

I, Binger Hermann, Commissioner of the General Land Office, do hereby certify that the annexed tracing is a true and literal exempli-cation of a part of a map of definite location of the Jamestown and Northern Railroad, approved by the Secretary of the Interior on June 26th, 1883, and now on file in this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed at the City of Washington, on the day and year first above written.

BINGER HERMANN. [SEAL.]
Commissioner of General Land Office.

That the map of definite location above referred to, and approved by the Secretary of the Interior on June 26, 1883, was filed in the United States Land Office at Fargo, some time during the
14 month of August 1883.

4th. By deed of conveyance properly executed and delivered the said Jamestown and Northern Railroad Company duly conveyed to the plaintiff herein, on April 21st, 1898, the line of railroad of

the said Jamestown & Northern Railroad Company, including the road as constructed over the land described in the complaint herein, and including all of the right, title and interest of the said Jamestown & Northern Railroad Company in and to the right-of-way occupied by it over the land described in the complaint, and that thereafter said deed of conveyance was duly recorded in the office of the Secretary of the State of North Dakota, and that the plaintiff herein has succeeded to all the rights of the said Jamestown & Northern Railroad Company, if any it had, in and to the right of way occupied by the defendant over the land mentioned in the complaint; that the Southwest Quarter, (S. W. ¼) of Section six (6) township one hundred and forty seven (147) range sixty six (66), Foster County, Dakota Territory, was public land of the United States; said tract was surveyed by the government sometime prior to October 2nd, 1884, and on said last mentioned date the plat of survey thereof and of the township on which said quarter section is situated, was recorded in the United States Land Office at Fargo, North Dakota;

5th. Plaintiff has not — nor did its predecessor in interest, at any time institute proceedings or resort to any process whatever under the state or Federal laws, to condemn a right of way across said land, or to divest defendant or her predecessors in interest of her or their title, or any possessory claim that she or they might have to said land, other than the filing of the map of definite location, as hereinbefore set forth. Plaintiff and its predecessor in interest, the Jamestown & Northern Railroad Company, have taken for use as a right of way upon said land, a strip 200 feet wide, being 100 feet on each side of the center line of its said railroad, and extending across said land, and which strip includes — acres; defendant and her predecessors in interest have not at any time consented to the taking or use of said land by plaintiff, and has not received any compensation for said taking or for the injury and damage, if any, inflicted thereby.

6th. On and prior to the 22nd day of July, A. D. 1883, the land in controversy, towit: Southhwest quarter (S. W. ¼) of section six (6) in township one hundred and forty seven (147) north, of range sixty six (66) west of the fifth principal meridian, was unsurveyed public land of the United States, agricultural in character, not reserved from sale and was subject to settlement under the pre-emption law of the United States then in force. On said 22nd day of July, A. D. 1883, Frederick G. Barlow was a citizen of the United States, over the age of twenty one years, had never had the benefit of the pre-emption laws of the United States, was not the proprietor of 320 acres of land in any state or territory, had not quit or abandoned his own land or his residence thereon to reside on the land above described and was, in all respects, legally qualified to initiate proceedings under the pre-emption laws of the United States to obtain title to 160 acres of land agricultural in character from the public lands of the United States.

7th. On said 22nd day of July, A. D. 1903, intending to make entry of the said land hereinbefore described when the same was surveyed, and to acquire title to the same by virtue of compliance

with the pre-emption laws of the United States, said Frederick G. Barlow settled upon said land and took up his residence thereon. At the time of such settlement there was not a railroad track laid or line of railroad in operation across said land at any place nor had the plat or profile of the section of railroad extending across said land hereinbefore referred to been filed in the United States District Land Office at Fargo.

8th. From the date of his said settlement, said Frederick G. Barlow continuously resided on said land and made the same his home and cultivated and improved the same until a survey thereof was made; and on the 8th day of October, A. D. 1884, and within
16 90 days after the receipt at said district land office of the approved plat of the township embracing his said pre-emption settlement, said Frederick G. Barlow filed in said District Land Office at Fargo, a written statement describing the said land so settled upon by him and declaring his intention to claim the same in accordance with the pre-emption laws of the United States, alleging settlement upon said tract as of the 22nd day of July, A. D. 1883, as aforesaid.

9th. Thereafter, having continued his residence upon and improvement of said land, according to law, on or about the 6th day of July, A. D. 1885, after due notice of his intention so to do, said Frederick G. Barlow made final proof of his entry, settlement, residence upon and improvement of said land as aforesaid and the payment required by law and submitted the same to the register and receiver of said district land office at Fargo, and on said 6th day of July, A. D. 1885, received from said district Land Office a final certificate of entry of said land. Thereafter, pursuant to the said settlement, entry and final proof of said Frederick G. Barlow upon said land, as aforesaid, there was issued and delivered to him by the Government of the United States, a patent, dated November 7th, A. D. 1888, granting and conveying to him in absolute fee simple the said land by the description hereinbefore given, without limit, reservation or deduction of any kind or to any extent whatever.

10th. Said Frederick G. Barlow continued to hold the said land under the grant and title thereto acquired by him as hereinbefore set forth, until the time of his death in or about the year 1901; at which time he was with the defendant herein, occupying said land as a homestead under the law of this State. The defendant is the widow and sole heir and devisee of said Frederick G. Barlow and is still occupying said land as her homestead and is invested with all estate and title thereto acquired and held by said Frederick G. Barlow at the time of his decease.

Dated November 8th, A. D. 1903.

BALL, WATSON & MACLAY,
Attorneys for Plaintiff.

S. E. ELLSWORTH,
Attorney for Defendant.

There was then offered and received as evidence on the part of the plaintiff a deposition as follows towit:—

Deposition of Richard Relf.

Q. Where do you reside?
A. St. Paul.
Q. Where you at any time and, if so, when in the service of the thern Pacific Railroad Company? Just give us your whole his- with it briefly.
A. I was with the Northern Pacific in 1867, 1870, and 1876 and n again in 1897. From 1879 I was continously in its employ many years.
Q. Were you in the employ of the Northern Pacific in 1882 and 3?
A. Yes.
Q. Where were you located?
A. At Brainerd, Minnesota.
Q. What was the nature of your connection with the Company at t time?
A. I was in charge of the drafting department of the Chief gineer's office.
Q. Were you familiar with the construction of the Jamestown & rthern Railroad in the territory of Dakota?
A. Yes, so far as they were returned to the office, I was not out the line.
Q. At that time was the chief engineer's office of the Northern ific located at Brainerd?
A. It was.
Q. What connection, if any, did the Jamestown & Northern have h the Northern Pacific Railroad Company?
A. It was one of the branches that they were building.
Q. Who built the Jamestown & Northern, what company?
A. The Northern Pacific.
Q. What interest, if any, did the Northern Pacific have with the mestown & Northern by way of stock ownership?
A. I don't know as I can say, only I know that they controlled it.
Q. Who was the chief engineer of the Northern Pacific Railroad mpany in 1882 and 1883?
A. General Anderson, Adna Anderson.
Q. Do you know whether he is alive now or not?
A. No he is not. He has been dead for near a dozen years uess.
Q. What supervision, if any, did the chief engineer's office of e Northern Pacific have over the construction of the Jamestown Northern?
A. It was entirely under their control and direction.
Q. What engineer was on the ground in charge of the construc- n of that road?
A. Tilden was immediately in charge. B. P. Tilden.
Q. In the ordinary course of business during the construction of

that road what reports, if any, did Mr. Tilden make to the office of the chief engineer of the Northern Pacific?

A. Well, he made first regular monthly estimates of all the work done, where it was done and so forth.

Q. What do you mean by an estimate?

A. The amount of work done; if it was grading, the number of yards the contractors had done and the price paid.

Q. These estimates then were in the form of reports of work performed?

A. Yes.

Q. Did he also furnish in the same way reports of track laying?

A. He did. Those were furnished daily on slips, as the work progressed.

Q. How often were the estimates or reports of grading furnished?

A. They were monthly. Everything up to the last day of the month, I think.

Q. When was the Jamestown & Northern road constructed?

A. Well, it dragged out quite a ways. I think it began in 188[illegible] and ran on two or three years.

Q. During the construction of this road, and while Mr. Tilden was in charge, who was the immediate superior to whom he reported?

A. All reports were made to General Anderson. Of course they passed through the hands of the principal assistant in the field, Alexander, and into Mr. Mason's office to be made up and vouchered for payment. Mr. Mason was the principal office assistant.

19 Q. What was your connection with General Anderson's office?

A. I had the charge of the making of all maps and profiles.

Q. What further reports beside these grading reports and estimates and track laying reports were furnished to General Anderson's office by Mr. Tilden?

A. There were profiles showing the grading done for each month. They came in with the estimates, and that profile was sent back to him, as is my recollection, and he colored it up again for the next month as the work progressed.

Q. When such profiles arrived in General Anderson's office what, if anything, did you have to do with them personally?

A. I transferred this coloring, the amount of work done during the month, to the general office profile.

Q. Was the general office profile thereafter retained in the office for reference and for use in connection with the construction and maintenance of the road?

A. It was, and I suppose is there yet.

Q. I hand you paper marked "Plaintiff's Exhibit 1 H. L. D.", consisting of five sheets of paper and ask you if you have ever seen it before, and if so, what it is?

A. It is the monthly return of October 31st, 1882, of grading done on the Jamestown & Northern as estimated by B. P. Tilden, assistant engineer in charge.

Q. Are you familiar with Mr. Tilden's hand writing as he wrote
1882?
A. I remember it quite distinctly.
Q. In whose hand writing is this paper?
A. That is his hand writing.
Q. At the top of the first column on each of these sheets appear
he letters "Sec." Will you please state what that means.
A. Section. The numbers follow of course.
Q. What was m-ant by the word "Section" as used in railroad
onstruction at that time?
A. They were usually a mile in length as near as we could get
them conveniently; for convenience.
20 Q. Were sections some times a little more or some times
a little less?
A. Yes, they were not necessarily exactly a mile. They were
divided so as to accom-odate the work. A cut would have to be
carried a thousand feet to make a full and the man who had the
contract for the cut of course his section would run on to the fill.
Q. I notice that these sections on this Exhibit 1 run from 1 to 59
inclusive. Where did section 1 begin?
A. It began at the junction with the Northern Pacific at James-
town, just beyond Jamestown.
Q. At the top of the second column on each sheet of this exhibit
appear the words "station to station". What is the meaning of the
word station as there used?
A. Every hundred feet was called a station.
Q. At the top of the fourth column on each one of these sheets
appear the words "previous estimate" and in that column appear
figures. What is the m-aning of previous estimate as there used,
and as ordinarily used in railroad construction?
A. Estimates for previous months made from time to time as the
work progressed.
Q. Do you use "estimate" in the same sense as previously used,
namely, as reports or statements?
A. How is that?
Q. Question repeated?
A. Yes. An estimate is a report. He reports an estimate of the
work done.
Q. What do these figures under the column "previous estimates"
show?
A. Al- work that had been done prior to this particular month.
Q. Do these figures refer to the number of cubic yards?
A. Cubic yards of earth, rock, gravel or whatever it was they
were moving.
Q. At the top of the next column appear the words "total num-
ber of cubic yards" and in that column appear figures. What do
those figures refer to?
A. That is the total amount that had been moved up to and
including this estimate of October 31st, but it don't seem
21 as if they had done any work in October.
Q. When you get over to the end you see that it does.

A. Yes, it brings in where there was work done in October in different sections. These first sections were all completed before that time.

Q. The difference between the quantity shown in the last column and the one marked "previous estimate" shows what?

A. Shows the October estimate.

Q. The amount moved in October?

A. Yes.

Q. And in the last column of each sheet appear certain names, what do those names refer to?

A. They are the different contractors who were on the work.

Q. I call your attention to an impression at the bottom of each one of these sheets reading "office of Eng'r in Chief, N. P. R. R. Co. Rec'd Nov. 14, 1882, Brainerd, Minn." I will ask you how that came there?

A. That is the regular rubber stamp that was in use in the chief enginer's office at Brainerd at that time, and all the papers were stamped as they came in each day. The date of their receipt.

Q. After this paper marked plaintiff's Exhibit 1 was received at Brainerd what was done with it? Was it retained there?

A. In the office of the principal assistant where all accounts and vouchers were made up. Each contractor's work was taken from this estimate and a voucher made out for the amount due him for that month, less the percentage which was retained always.

Q. These estimates then on file in the chief engineer's office at Brainerd were made the basis for payment by the Northern Pacific Company to the respective contractors?

A. Yes.

Q. I hand you a paper marked for identification "plaintiff's Exhibit 2 H. L. D." consisting of two sheets of paper attached and will ask you what that is.

A. This is an estimate of work done on the Jamestown & Northern for the month of May, 1883, made by Mr. Tilden.

22 Q. Is that in his hand writing?

A. This is in Mr. Tilden's hand writing.

Q. Is the testimony that you have already given regarding the meaning of the words at the head of the respective columns, and the meaning of the figures in those columns in plaintiff's exhibit 1 true in respect to this plaintiff's Exhibit 2?

A. Yes, Exhibit 2 is a continuation; is a subsequent estimate covering apparently the same ground as the other.

Q. Former question read.

A. Yes.

Q. Is the testimony which you have given regarding the receiving stamp on plaintiff's Exhibit 1 true regarding the receiving stamp shown on this exhibit?

A. Yes.

Q. Was the same course taken with respect to this exhibit after it was received as with plaintiff's Exhibit 1?

A. Yes.

Q. I hand you paper marked "plaintiff's Exhibit 3" and will ask ou if you have ever seen that before?
A. Yes.
Q. When and under what circumstances?
A. During the construction of the Jamestown & Northern in the hief engineer's office at Brainerd.
Q. Under what circumstances was that paper made?
A. It was made to record the work as it progressed.
Q. What was it made from?
A. It was made from the original notes of surveys of the definite ocation of the road.
Q. You have previously testified that Mr. Tilden sent in monthly rogress profiles showing the stage of work on the road in question; n what way were those progress profiles used in making Exhibit 3?
A. Those were simply used to transfer the color of the month, he color showing the work done during the month inn question.
Q. Was this exhibit 3 made under your personal supervision?
A. Yes.
Q. Does it correctly show the work done in the respective months s indicated by the legends at the right hand end of the exhibit by eference to colors and months?
A. Yes.
23 Q. What was done with the original progress profiles made by Mr. Tilden after the data shown on them was transferred o this Exhibit 3?
A. I don't think they were retained at all. They just served heir purpose to get the coloring on this office profile.
Q. And they were no longer used as documents for reference in your office work?
A. No.
Q. After this Exhibit 3 was completed was it used as a basis for eference in all matters relating to the construction and mainteance?
A. It was.
Q. I hand you herewith paper marked "plaintiff's Exhibit 5" and will ask you if you have seen that before, and when?
A. Yes.
Q. What is it?
A. It is a report of track laid on the Jamestown & Northern on the 13th of August, 1883.
Q. Who was it made by?
A. By B. P. Tilden, assistant engineer in charge.
Q. What was the usual chourse of business and construction with eference to making such reports?
A. They were made upon the night of the day on which the track was laid and sent in to the main office.
Q. In the writing on this paper in the hand of B. P. Tilden?
A. It is.
Q. When was the office of the chief engineer moved from Brainerd to St. Paul, about?
A. I think about in July. I think it was in July.

Q. What year?
A. 1883.
Q. What was done with the files and records of the office at Brainerd when the office itself was moved to St. Paul?
Q. They were all brought down to St. Paul to the main office in the general office building.
Q. Were all the papers concerning which you testified today which were received at Brainerd brought to the St. Paul office?
A. Yes.
Q. When the Brainerd office was removed to St. Paul did you come to St. Paul?
A. I did.
24 Q. Did you continue in the same capacity at St. Paul that you had occupied at Brainerd?
A. I did.
Q. And for what length of time?
A. For about a dozen years. No, about ten years.
Q. Until about 1893?
A. Yes.
Q. Were these papers, plaintiff's exhibits 1, 2, 3 and 5 part of the files of the chief engineer of the Northern Pacific Railroad at St. Paul during all of that time?
A. Yes.
Q. And were they referred to as the cource of information required in matters of construction and maintenance of that part of the road to which they relate?
A. Yes.

There was also offered and received in evidence, on behalf of plaintiff, a deposition as follows, to wit:

Deposition of J. D. Koren.

Q. Where do you live?
A. St. Paul.
Q. What is your age?
A. Forty seven.
Q. Are you in the service of the plaintiff?
A. Yes.
Q. In what capacity?
A. As chief draftsman in the chief engineer's office.
Q. Are your headquarters in St. Paul?
A. Yes.
Q. How long have you been connected with the chief engineer's office?
A. I have been in the chief engineer's office since 1894, but not as chief draftsman.
Q. But in some capacity or other you have been — the chief engineer's office since 1894?
A. Yes.

Q. Have you seen Plaintiff's Exhibits 3 and 5?
A. Yes.
Q. Are they a part of the records of the chief engineer's office of the Northern Pacific Railway Company?
A. Yes.
Q. Are they in your custody?
A. Yes.
Q. So far as you know have those exhibits been a part of the records of the chief engineer's office ever since you have been in the service of the company?
A. Yes, sir.
25 Q. And does your answer include the office of the chief engineer of the Northern Pacific Railroad Company and the receivers of that company as well as the present company?
A. Yes.
Q. What relation does the Railway Company bear to the Railroad Company with respect to these records?
A. They are the successors to the Railroad Company.
Q. What is the scale s-own upon Plaintiff's Exhibit 3 horizontally?
A. It is 400 feet per inch.
Q. How many feet to each one of these little squares?
A. One hundred feet to each.
Q. And what is the scale vertically?
A. It is thirty feet per inch, that is one foot for each division.
Q. For each small square or between each of those small lines?
A. Between the small lines. Five for each square.
Q. What does the colored line of irregular width running lengthwise of Exhibit 3 represent.
A. That is the surface line of the ground.
Q. At the point were the roadbed is constructed?
A. Yes, the center line of the track.
Q. In case it is built upon a grade how will that fact be indicated upon this map?
A. The grade is shown above the surface line. It is a red line.
Q. The grade line is the red line?
A. Yes, the surface line is black.
Q. And where portions are shown below the line just referred to what does that indicate?
A. That is a fill: where the surface line is below the grade line.
Q. Referring to this paper marked "Plaintiff's Exhibit 4" H. L. D." which I show you, please state what that is?
A. It is a print made from a tracing. The tracing was made from Exhibit 3, but not traced directly.
Q. What stations are shown upon this Exhibit 4?
26 A. The same stations as on Exhibit 3.
Q. Give the number of the stations thus shown.
A. 2690 to 2750.
Q. On what line or branch of the road is this?
A. It was formerly the Jamestown & Northern; it is now called the Devil's Lake Branch.
Q. Does this Plaintiff's Exhibit 4 indicate the government sub-

divisions of the land over which the portion of the line of that road is shown?

A. Yes, by vertical lines.

Q. Will you state what stations of this line of railroad are comprehended with the southwest quarter of section 6, township 147 north of range 66 west, in Foster County, North Dakota?

A. Practically from station 2695 plus 50 to station 2722.

Q. What do you mean by the term "plus 50"?

A. That is fifty feet added to station 2695.

Q. Then, as I understand you, the south line of the southwest quarter of the above mentioned section 6 would be identical with a point fifty feet north of station 2695, as shown upon plaintiff's Exhibits 3 and 4?

A. Yes.

Q. And the north line of the southwest quarter of such section 6 would be identical with station 2722?

A. Yes.

Q. Please compare Plaintiff's Exhibit 4 with that portion of Plaintiff's Exhibit 3 which it purports to represent and state whether it represents the same correctly?

A. Yes sir, it does.

There was also offered and received in evidence, on the part of plaintiff, a deposition as follows, towit:

Deposition of R. A. Weston.

Q. Where do you live?

A. St. Paul.

Q. Are you in the service of the plaintiff?

A. Yes.

Q. In what capacity?

A. Chief clerk in the Chief engineer's office.

Q. How long have you been employed in that office?

A. Since 1894.

27 Q. Your first service was with the receivers of the Railroad Company?

A. Yes.

Q. And afterwards with the Railway Company?

A. Yes.

Q. As chief clerk in the Chief engineer's office first of the receivers and later of the plaintiff have you had anything to do with Plaintiff's Exhibits 1 and 2?

A. Yes thay have been in my custody.

Q. Are they in your custody now?

A. Yes.

Q. Are they a part of the files and records of the chief engineer's office?

A. Yes.

Q. Did you find them among those files when you came into the office and took your position, were they there?

A. They were there but I don't remember of having occasion to look them up.

Q. Approximately what is the distance in miles from the point of intersection of the Jamestown & Northern railway with the main line at Jamestown to the south line of the southwest quarter of the section 6 referred to in this action?

A. Approximately 51 miles.

Q. Can you say that it is certainly not more than 53 and certainly not less than 50 as the road was originally constructed?

A. Yes sir.

There was also offered and received in evidence, in behalf of plaintiff a deposition as follows, towit:

Deposition of H. A. Hogue.

Q. State your name, age, place of residence and occupation.

A. A. H. Hogue, Carrington, N. D. age 46, real estate business.

Q. How long have you been a resident of Foster County, N. D.?

A. Since the fall of 1881.

Q. State whether or not you are acquainted with the S. W. ¼ of section No. 6, township no. 147, Range no. 66, Foster County, N. D.

A. I am.

Q. You may state how long you have been acquainted with that tract of land.

28 A. Twenty one or twenty two years, in a general way.

Q. You may state whether or not you were in Foster County, and along the right of way of the Northern Pacific Railway Company during the year 1883.

A. Yes sir, I was.

Q. What business were you engaged in at that time?

A. Rodman of the engineer corps.

Q. Was this engineer corps in the employ of the Northern Pacific Railroad Company, and constructing the grade at that time?

A. Yes sir.

Q. You may state if you know who the engineer in charge of that party was.

A. His name was Norville McGregor.

Q. You may state whether or not you were acquainted with one, B. P. Tilden.

A. Yes sir.

Q. Who was he?

A. He was what is called Chief Engineer of this branch. He had entire charge of the work on the branch.

Q. What do you mean by this branch?

A. The branch of the Northern Pacific from Jamestown to Minnewaukon at that time; it was afterwards built on to Leeds.

Q. You may state if you know what time the stakes were set for the right of way over and across the S. W. ¼ of Section No. 6, Township no. 147, Range no. 66.

A. That is a question I cannot answer, but if you will let me explain; the right of way was not measured out, the stakes were not put in on the right of way, there was no such work as that done. They were entitled to so much right of way on each side of the track, but it was not measured out so many feet from the center of the track.

Q. I want to know if you can state about what time the stakes for the grade, if any, were placed over and across this quarter.

29 A. What you are getting at is what is called the cross-sectioning the grade. That was done some time in the fore part of June 1883.

Q. You may describe what those stakes consisted of.

A. It consisted of a center stake in the center of the railroad, and that center stake read, either fill or cut so many feet and tenths, and on either side was measured out according to whatever the grade was, and the center stake showed fill or cut so many feet or tenths.

Q. About how far a*prat* were these stakes?

A. A hundred feet from every station, but in case of a break in the grade they would be closer. Where you came out at the level of the ground there would be a grade stake marked "0" and would show neither fill or cut.

Q. And were these stakes visible so that anyone going by the land could have readily seen them?

A. Yes sir, only when they had been driven over and broken down, which often occur-ed.

Q. You may state if you know about what time of year the grade was constructed over and across the S. W. ¼ of section No. 6, township 147, Range number 66 in this county.

A. The grade was constructed some time during the fore part of the month of July. Not finished up, but most of it was. There was some places where it would just strike grade, a few places like that, that wasn't finished up until shortly before the track was laid, although we went ahead and run track centers just the same.

Q. About what time of year was it that the grading was started along and over that land?

A. The grading was started there some time during the month of May 1883. It might have been the first of June, but right along that time. It is hard to remember just exactly.

Q. Are you certain that at that time the grading across the land above referred to was done prior to the 22nd day of July, 1883?

30 A. I am, with the exception that there was some places that wasn't completely finished up that was finished up afterwards, where there was no fill or grade.

Q. Then the grading was done previous to that time with the exception of levelling up——

A. Yes sir, there is what is called a surfacing gang that came along later and finished up.

Q. You may state whether or not the grade along and over that land was visible and could be readily seen.

A. Yes sir.

Cross-examination.

Mr. Ellsworth:

Q. You say you were rodman?
A. Yes sir.
Q. What were the rodman's duties in connection with the work?
A. The rodman always accompanies the engineer and holds the rod for the records of the grade, and work along that line.
Q. Then you were ahead of the graders?
A. Yes sir, and also with the graders; we had charge of the work, and had to give them grades every few days. They would take out the stakes we had put in and put in stakes of their own, and we would go back and give them grades, and give them estimates on their work so that they could get their money.
Q. State if you know at what point the grade of this Jamestown & Northern Railroad had reached in the spring of 1883.
A. It had reached this place, Carrington; didn't get in until December 1882.
Q. Then at the opening of the working season of 1883 the grade was at Carrington?
A. Yes sir, started right here.
Q. State if you know how far from Carrington this land in question, the S. W. ¼ of Section No. 6, township 147, range 66 is?
A. About eight miles.
Q. Near what is known as the town of Barlow?
A. Yes sir.
31 Q. At what time of the year did the work of grading commence here at Carrington, in 1883?
A. About the 26th or 27th of April.
Q. The graders went to work at that time?
A. Yes sir.
Q. You know the location of what is known as the Bog Slough?
A. Yes sir.
Q. About how far is that north of Carrington?
A. About three miles and a half.
Q. In the construction of that grade from Carrington to Barlow, it crossed the Big Slough?
A. Yes sir.
Q. It *is* necessary to put in a trestle work at the slough?
A. Yes sir.
Q. Isn't it true that the workman constructing the grade were occupied a considerable time with the work at the slough in putting in the trestle work?
A. Yes sir but the grading didn't wait on that.
Q. Do you know about what time the slough was reached by the graders?
A. I couldn't tell, the work was done between here and the James River about the same time. They commenced at the James River and worked back south. We established our camp there, and finished up pretty well to the James River, and then we moved on beyond

the James River. They had a large force of contractors here and finished it up as rapidly as they could.

Q. Do I understand you that the work was commenced at the James River at the same time it was commenced here at Carrington?

A. No sir.

Q. How much later?

A. Possibly two weeks later.

Q. Were there any gangs at work between these two places?

A. No sir.

Q. What places?

32 A. All along and within three miles of New Rockford.

Q. That is, the gang that you were with, established camp there.

A. Yes sir.

Q. About how far distant were these gangs from each other?

A. One man's work extended up to another man's work.

Q. What was the length of the section worked by each gang?

A. One man might take a mile, and another man take a half a mile, and some of them had two miles, it depended upon the size of the force altogether.

Q. Do you mean that each gang brought his grade up to the practical level irrespective of whether or not it was completed from Carrington to the James River?

A. Yes sir to about to where New Rockford is, not exactly to the river.

Q. Now do you know, Mr. Hogue, at what time the grade was completed, constructed from Carrington to New Rockford?

A. If my recollection served me right, it would be some time in September.

Q. Not all completed until September?

A. Yes sir.

Q. This land near Barlow is just about half way between Carrington and New Rockford?

A. Yes sir, just about half way.

Q. Was there anything at that time that especially called your attention to this particular tract, the S. W. ¼ of Section No. 6?

A. No sir, just in a general way because we had general charge of the work.

Q. When you say it crossed this land in the early part of July, you speak of this in a general way?

A. Yes sir, in that vicinity there.

Q. What if any circumstance was there that enables you to recollect the fact that it was completed in the vicinity of Barlow along the early part of July?

33 A. The fact, that we were ordered back to Carrington to run the track center, that is what they lay the track by, and we came back here and run the track centers up to where the grade was completed, which was north of Barlow, I would judge some two miles, and we also at that time tiled the railroad on to the township lines.

Q. What about that circumstance, what connection does that have with building across the land?

A. You asked the question what brought it to my mind, I can remember coming back here and doing that work.

Q. Did you make any note of the date?

A. No sir, I am wholly depending upon my memory.

Q. You say at that time the grade was completed in the early part of July?

A. Because we came down and run the track centers at that time, and we couldn't have run the track centers unless it was done.

Q. How do you know it was that particular time?

A. To the best of my memory and knowledge.

Q. Now to the best of your knowledge, would that enable you to state positively that this was constructed in the early part of July?

A. I couldn't swear positively that it was, but to the best of my belief it was?

Q. But it might have been some time in August?

A. There is one thing that makes me think it was, at the time the track was laid through Barlow, the iron was put down sometime near the 10th or 15th of August, and it must have been previous to the 22d of July that we run the track centers or the work couldn't have been completed at that time.

Q. Do you remember positively that the iron was put down early in August?

A. Some where between the 10th to the 15th of August. One thing that makes me remember was that we had sent for some supplies, and there were brought in one of their cars, and I was sent after them.

Q. You think the rails were laid and trains run over the
34 road by the 15th of August?

A. They were just work trains, following up with iron all the way.

Q. Now I understand you to say that at the time the grade was completed across there in July, as you remember, there were some breaks in it.

A. That is if I recollect rightly there were some breaks there, possibly on that quarter; it was not only there but several places were not completed until the surfacing gang came along.

Q. At these places nothing had been done?

A. I am under the impression that there is one or two on that place.

Q. At such places there was no work done?

A. Just a little scalping the sod had to be removed.

Q. It was just simply scalped?

A. Yes sir.

Q. Do you remember Mr. Barlow's claim shanty at that time?

A. I knew Mr. Barlow very well at that time, and had known him here, and he and I had a great many talks together, and I am under the impression that he had built his shanty that time.

Q. At the time you came back for the purpose of running the track center, wasn't his shanty there at that time?

A. I am under the impression that it was, but I couldn't be positive about it.

Q. Now at the time you came back for the purpose of running the track center, you had been up there determining the grade before the graders came up there at all?

A. Yes sir.

Q. When did you do that?

A. Most of this work from here to Barlow, and little past there, was done in April. We had to do it ahead of the graders. In the fall of 1882 we had cross sectioned it up as far as the Big Slough.

Q. Then you commenced north of the big slough?

A. I think right at the north end of the big slough. We had the trestle work staked out, and we commenced right at the
35 other end of the trestle work.

Q. Then you cross sectioned across to Barlow and run track centers?

A. No, we took charge of the grade then, we established camp up near to New Rockford.

Q. When you went through cross sectioning, wasn't this claim shanty of Mr. Barlow's on this land, don't you remember seeing it there?

A. I remember meeting him, he boarded with old man Soliday; he was interested in our work, and talked with me about the work; I cannot remember of seeing him up there at that time, but know he was in the country, and know he was interested.

Q. You can remember of seeing his claim shanty there?

A. Yes, but I don't remember just when I first saw it.

Q. When was that trestle work put in at the big slough?

A. My recollection is that we got that trestle work in there some time the fore part of August 1883.

Q. Isn't it true that the work of putting in the dump there was done after the trestle work was put in?

A. There might have been some furnishing up there.

Q. About the time the trestle went in?

A. Yes sir.

Q. Trains couldn't pass until that trestle was in?

A. No sir, they hurried that along as fast as possible.

Q. Was there any change made in the line of the grade at any time after you first cross sectioned it?

A. You mean to right or left?

A. Yes sir, between here and New Rockford.

A. I don't think so, I have no recollection of any. There was some changes made before the cross sectioning, but I don't remember of any after the cross sectioning.

Q. Those stakes made in cross sectioning, didn't positively determine the line of grade.

36 A. Yes sir, the grade is then established. There might come something very serious that would change it, but they never cross section until they establish the grade.

Q. But generally they don't?

A. No sir, generally they don't.

Redirect examination.

Mr. McCue:

Q. The grading across this land in question was commenced some time in May 1883?
A. I think it was in June, probably the latter part of May or first of June.
Q. And the grading across the land in question was completed with the exception of surfacing, about the middle of July in 1883?
A. To the best of my recollection it was.

Recross-examination.

Mr. Ellsworth:

Q. Does your memory enable you to state at this time whether or not the grade across this land was commenced, or done, before or after Mr. Barlow's claim shanty was put up.
A. I am under the impression that his claim shanty was there, but I cannot be positive.

Redirect examination.

Mr. McCue:

Q. If this claim shanty was not put up there until July 23, 1883, then——
A. I cannot be positive about the claim shanty; I remember seeing it, but just when it was put there I cannot say.
Q. Then you wouldn't want to testify that the claim shanty was there previous to the time the grade was completed?
A. I couldn't testify positively as to that.
Q. Did you pay any particular attention to this claim shanty?
A. No sir, because claim shanties were going up all over the country, and I wasn't paying any attention to it.
37 Q. You didn't pay any attention to them at all?
A. No sir, we didn't.
Q. But your recollection of the work along on the grade is refreshed on account of your recollection with the engineer corps?
A. Yes sir, being right over it every day.

Witness excused.

There was also offered and received in evidence on the part of plaintiff a deposition as follows towit:

Deposition of William Farquer.

Q. State your name?
A. William Farquer.
Q. How old are you?
A. 68 years.
Q. How long have you been a resident of Foster County, N. D.?

A. Twenty one years.

Q. Were you acquainted with the S. W. ¼ of section No. 6, township No. 147, Range No. 66, Foster County, N. D. during the year 1883?

A. I was.

Q. You may state whether or not you were also acquainted with the right of way and grade of the Northern Pacific Railroad Co. between Carrington and New Rockford.

A. Yes sir, I went up and down that grade as it was being established at that time.

Q. Do you remember whether or not the grade was commenced over and across the land above referred to during the month of June in the year 1883?

A. According to my best impression it was.

Q. That was the railroad grade of the Northern Pacific Railroad Co.?

A. Yes sir.

Q. You may state whether or not the road was completed prior to July 22, 1883, over and across this land.

A. I think it was.

Q. You stated that you went up and down there a great many times during the spring of 1883 along the right of way, and
38 around the land in question, is that true?

A. Yes sir.

Q. What were you doing at that time?

A. I was viewing the country for the purpose of locating some of my relatives and friends along the line of the Northern Pacific Railroad in the vicinity of Barlow.

Q. The residence of the defendant Barlow was commenced upon this land in question about the 22 or 23 day of July 1883, and will you state whether or not the grade was constructed over and across this land previous to the time of the settlement of Mr. Barlow, which was the 22 or 23 of July 1883.

A. I would state that the grade was constructed previous to that time.

Cross-examination.

Mr. Ellsworth:

Q. Do you know Mr. Barlow?

A. Yes sir.

Q. You know that this land was his pre-emption, this S. W. of ¼ of 6?

A. It was so stated by himself to me at the time.

Q. Now you had located yourself to the south of Carrington at that time?

A. No sir, I didn't locate until the 16th day of June, 1883.

Q. Now you had located yourself to the south of Carrington at that time?

A. No sir, I didn't locate until the 16th day of June 1883.

Q. When you located to the south of Carrington?

A. Yes sir.

Q. Previous to this time I understand you were up in the vicinity of this land?

A. Yes sir, quite often.

Q. At these times you saw Mr. Barlow?

A. I saw him, I believe, every time I visited that section of the country.

39 Q. He was on this land at the time, and had a house there?

A. Yes sir.

Q. He was there the first trip you made?

A. Yes sir, I was introduced to Mr. Barlow, the first time I saw him, on that quarter.

Q. Frederick G. Barlow, the husband of the defendant, Harriet A. Barlow?

A. Yes sir.

Q. At the time you were there, there was no grade across this land.

A. No sir, it was spaced off in sections between Carrington and the James River as I understood.

Q. Was grading going on?

A. Yes sir.

Q. North of Carrington?

A. Yes sir, wherever it was possible. There was a great deal of water over the country that year, and whenever it was so they could, men were grading.

Q. At the time you first saw Mr. Barlow there and his house there upon this land, there was no grade across this land?

A. I couldn't say positively, I think there was at the time.

Q. Do you know what date that was?

A. It was between the 17th and the 27th of May 1883.

Q. Do you think there was a grade across the land at that time?

A. Either a grade or part of a grade, I wouldn't say whether it was completed or not.

Q. By part of a grade, what do you mean; do you mean the surface had been plowed up.

A. The stakes etc., and the surface work being done partly.

Q. On this land on the 17th of May?

A. The first time I was there, and I was there again along in the latter part of May, and the last time I was there the grade was over the land.

Q. Did you only make these two trips to Barlow's house?

A. I made quite a number during the year, and I think the last trip was between the 13th and 15th of June.

Q. You think that was the last trip?

A. Yes sir.

40 Q. The first trip was between the 15th and 17th of May?

A. Yes sir, somewhere along there.

Q. Both times you visited him at the house?

A. Yes sir, because he was the only settler in that part of the country; we generally made that our starting point to where we wanted to go.

Q. Do you have any way of fixing these dates other than your memory?
A. No sir.

Redirect examination.

Mr. McCue:

Q. You stated that you made your own filing and settlement on the 16th of June 1883.
A. Yes sir.
Q. Are you sure that the trips that you made across this land in controversy was previous to the time of your entry, of your own land and settlement.
A. Yes sir, previous.
Q. You are positive that the grade of the Northern Pacific Railroad Co. was constructed over the land previous to the time you made settlement upon your land, which was the 16th of June?
A. I think it was.
Q. And do you think you are mistaken with regard to seeing Mr. Barlow's house upon the land the first trip you made up there?
A. No, I don't think I was mistaken, there was six or eight of us in company, and we stopped there and set in the shade of the house and talked with him about the general lay of the country as we were looking over it for locating prospective settlers and we rather advised with him for information concerning the country.
Q. Are you sure that was in 1883?
A. 1883, yes sure.
Q. He didn't build his house there until July 22, 1883?
A. That it where I am not positive whether the house he built was permanent. I couldn't possibly swear it was the same house, but it was upon the land.

41 Cross-examination.

Mr. Ellsworth:

Q. You say he told you on your first trip that that was his pre-emption?
A. Yes sir.
Q. And he had a house there at the time?
A. Yes sir, he had a shack there.
Q. You remember there was a house there?
A. Yes sir.
Q. At the time of your first trip?
A. Yes sir.
Q. You don't remember whether the grade was completed across the land at that time or not?
A. No sir.

Redirect examination.

Mr. McCue:

Q. But you do know that the grade was constructed over and

across this land previous to the time you made settlement upon your own land, which was the 16th day of June 1883?

A. Yes sir, was being constructed. After I made buildings on my own land I was in that country again. My son and my son in law both lived west of Barlow, and I visited them frequently while they were opening up their claims, during that summer, July and August.

Q. That was Elmer was it?

A. Yes sir, and John Henry my son-in-law.

Q. When did they start to live up there?

A. They commenced improving their claims that same summer. I couldn't state exactly when they commenced making improvements.

Q. Don't you think that you have got Mr. Barlow's house and his being there confounded with some of your later trips?

A. I don't think so according to my memory at the present time.

There was also offered and received in evidence on the part of plaintiff a deposition as follows towit:

Deposition of Ralph Hall.

42 Q. State your name, age and occupation?

A. Ralph Hall, age 52, a farmer.

Q. How long have you lived in Foster County, N. D. Mr. Hall?

A. Ever since the spring of 1882.

Q. You may state whether or not you were acquainted with the S. W. ¼ of section No. 6, township No. 147, Range No. 66 in this county during the spring of 1883.

A. I know where it is located.

Q. Did you know the land at that time?

A. Yes, knew it the year before, because my brother-in-law run the township lines here.

Q. You may state whether or not you saw the grading of the Northern Pacific Railroad being done that year?

A. I did, I was along the road two or three times a week freighting along the line for the contractors.

Q. You may state about what time the grade of the Railway Company was constructed along and over the land referred to.

A. I think it was the latter part of May or first of June 1883.

Q. Would you say that the grade was constructed across the land in controversy previous to the 22nd day of July 1883?

A. I think it was, I think the rails were laid in August.

Q. I will ask you if you were acquainted with F. G. Barlow during the summer of 1883?

A. Yes sir.

Q. Where did he live at that time?

A. Here in Carrington.

Q. What business was he engaged in?

A. Land business. With a man named Powell.

Q. Will you state that he was residing in Carrington during the summer of 1883?

A. Yes sir.
Q. Up and till how late in that summer?
A. He lived there till in the fall, he went up that winter on his claim.
Q. He moved from Carrington to his claim in the fall of 1883?
43 A. He was living there that winter. We were organized here that fall, and I was appointed sheriff, and he was the only man between here and New Rockford, he had a grocery there. That was during the winter of 1883 and 1884. He was in Carrington here all summer pretty near.
Q. Was he engaged in locating people?
A. He was in the real estate business with a man named Powell. I don't know whether he done much locating or not; I did a good deal of locating that year.
Q. You were appointed sheriff at what time?
A. It must have been in November.
Q. You stated that you were in the freighting business?
A. Yes sir.
Q. When did you commence to do freighting?
A. In the spring of 1883 about July, but I was up the road back and forward, commenced in May.
Q. During that time you noticed the progress they were making in the grading of the Northern Pacific?
A. Yes sir.

Cross-examination.

Mr. Ellsworth:

Q. You knew Mr. Barlow quite well?
A. Yes sir.
Q. Did you know him in the spring of 1883?
A. Yes sir, when he first came up.
Q. That was the spring of 1883?
A. Yes sir.
Q. Did his family come with him at that time?
A. No.
Q. Just here by himself making ready for them.
A. He was up there all that winter alone in the shack.
Q. Winter of 1882 and 1883?
A. Winter of 1883 and 1884.
Q. He was here in Carrington in the spring of 1883?
A. Yes sir.
Q. Did you know that this land was his pre-emption, this S. W. ¼ of 6?
A. Yes sir.
44 Q. You heard in the Spring of 1883 of a house being put up in the land?
A. No, I didn't.
Q. Do you remember when the store kept by Mr. Barlow was put up?

A. I think in the fall some time. I know the first trip I made up there after I was appointed sheriff in the fall, Strong and Chase sent some goods with me to him.

Q. You don't have any recollection of seeing a claim shanty on that land in the spring?

A. There were so many I couldn't say.

Q. Did you see, at the present site of the town of Barlow, a station put there at the time the road was built with platform, you remember that don't you, platform where the trains stopped?

A. Yes, something of that kind.

Q. This little building that Barlow occupied there, was the one built to the west side of the track?

A. No, he was on the east side of the track.

Q. The building he kept his store in was on the west side of the track?

A. No, he kept that at his house.

Q. That was the house that he lived in until two or three years ago; just before his death he built a new one.

A. Yes sir.

Q. When according to your best recollection did you first know that this house that he lived in and kept *sotre* in was there and was put there?

A. It was in December 1883.

Q. That is the first you remember of seeing it?

A. No sir.

Q. You don't remember of seeing it in July 1883?

A. It might have been there, but I don't remember.

Q. When did you first know that Mr. Barlow had taken that land as his preemption?

A. The first thing I knew anything about it was that same trip I made in December. I stopped there, and I said, when did you
45 start a store here, and he said, I have been here for a month or two.

Q. How long before that time was it that you had been up that far?

A. I had been up every week or two all summer.

Q. A *wekk* before, the time you saw the house there?

A. No, I didn't, not before that trip. I hadn't been up probably for three or four weeks.

Q. This house had been up between the two trips?

A. I think so, I cannot say positively about that.

Q. At what time do you think the grade was finished across this land?

A. Last of May or fore part of June.

Q. When was the iron laid?

A. In August.

Q. What time did the trains commence to run?

A. The construction train must have started out from here in June.

Q. The grading was commenced here at Carrington that year?

A. Yes sir.

Q. This land is about eight miles north of here?
A. Nine miles.
Q. At what time was it commenced here at Carrington?
A. The spring of 1883 was pretty late, must have been May.
Q. Do you think it reached Barlow the last of May?
A. I think it ought to because there was a great many men at work; each man had a mile or two miles, such as that.
Q. You think it was completed from here to New Rockford about the first of June?
A. I think so.

There was also offered and received in evidence on the part of plaintiff the deposition of J. R. Winslow, as follows, to-wit:

Deposition of J. R. Winslow.

Q. State you name? age and place of residence.
A. John R. Winslow, age 52, residence New Rockford.
Q. What is your business?
A. Farming.
Q. How long have you lived in New Rockford?
46 A. Since April 10, 1883.
Q. When did you first come to Foster County, N. D.?
A. I came here in August, 1882.
Q. You may state whether or not you were connected in any way with the construction of the Northern Pacific Railroad from Jamestown to Leeds?
A. I was a contractor.
Q. You are acquainted with the location of the land in controversy, the S. W. ¼ of section 6, township No. 147, Range No. 66?
A. Yes sir.
Q. You may state whether or not you were over that land in the Spring of 1883?
A. I was.
Q. You may state if you know what time the grade was constructed over and across the S. W. ¼ of that section, Section 6, Township 147, range 66?
A. My opinion is that it was completed the first of July, it might have been between the 5th to the 10th, but I think the first of July.
Q. Can you state about what time the grade was started over that land, the commencement of it?
A. The work was opened up in places all along in the fall 1882. The work out here two miles north of this place was done in the fall of 1882, and the work was opened in spots all along, even grading was done clear to New Rockford in the fall.
Q. In places?
A. Yes sir, in places.
Q. That was in the low places?
A. In the low places, and some places where it was high. That work was usually sublet to me who came along in the fall of 1882.

Q. You know that the grade across the land in controversy was completed previous to the 22nd day of July 1883?
A. Yes sir.
Q. What time was the cross sectioning done across the land in controversy?
A. In the fall of 1882.
47 Q. What is that, what does it consist of?
A. Setting a stake showing the amount of cut or fill.
Q. Is the road bed after that is done permanently located?
A. Yes sir.

Cross-examination.

Mr. Ellsworth:

Q. You don't mean that it was located just as permanently as though the rails were laid?
A. It shows what is to be done to make it permanent.
Q. That is, it marks out the line of road that is determined on at the time the cross sectioning is done?
A. Yes sir.
Q. Do you know who did this cross sectioning?
A. I think Mr. Hogue was one, and the head engineer in charge was B. P. Tilden.
Q. You think the cross sectioning was done in the fall of 1882?
A. I am satisfied it was cross sectioned clear through to the James River in 1882.
Q. Was it cross sectioned any in the spring of 1883?
A. It might have been if some of the stakes were knocked down, or the engineer at the head office, the same as other roads, might have changed the grade.
Q. You have known that to be done?
A. Yes sir, it would either lower or raise the grade. It wouldn't change the line.
Q. Do you know of any cross sectioning being done in May or June 1883 across this land?
A. No sir, I don't.
Q. You didn't hear the testimony of Mr. Hogue?
A. No sir.
Q. You spoke of its being opened up in places all along the line, what do you mean by being opened up?
A. The men that had sub-contracts along the line commenced grading and graded until it became so late that the ground was frozen so that they couldn't work any further.
48 Q. Was one or any of these spots about the land in question, the S. W. ¼ of 6?
A. I wouldn't be absolutely positive about that, it seemed to me that Mr. Finney had a piece of work close to that.
Q. Do you know whether it would be north or south?
A. South of that quarter.
Q. Did you know F. G. Barlow?
A. Yes sir.

Q. Do you remember the time he built a claim shanty on this S. W. ¼ of 6?

A. I couldn't state the exact time.

Q. Did you know that this was his preemption?

A. He was a squatter on there, that would be my opinion.

Q. You knew he was a squatter on this land in 1883?

A. Yes sir.

Q. You know he built his house on there in 1883?

A. Yes sir.

Q. Was that house built before or after the grade went over the land?

A. My opinion is that the grading was done before the house went up.

Q. Do you state this from any independent recollection of the fact that the house went up after the grade went by, or do you base your statement purely from the fact that you think the grading was done the first part of July?

A. That is my opinion; I don't recollect of ever meeting Mr. Barlow, or a house there at that time, or that place.

Q. Do you know about the date the house was built?

A. I do not.

Q. Do you know about the time the section of road extending over this land was ironed?

A. Yes sir, that section up there from Carrington, they came in here in November——

Q. Carrington?

49 A. Yes sir, and it remained here a year, and the next season it was ironed through by probably the first of November to New Rockford, or near that time.

Q. Reached New Rockford about the first of November?

A. I think so.

Q. About what time was the iron laid at Barlow, or over this land in question?

A. Probably some time in October.

Q. Now do I understand you that the grade was completed from Carrington to New Rockford by the first of July?

A. Nearly completed, there might have been a little to finish.

Q. Was there not some place where there was no grade at all at that time?

A. I don't know of any place where there was no grade; I know there was no place by the 15th of July any way not completed.

Q. Do you have any memorandum or data of any kind of these dates?

A. No sir.

Q. You are giving them entirely from your memory?

A. Yes sir.

Q. Now you stated that you thought the grade went over this land about the first of July, but it might have been the 5th or 10th.

A. Yes sir.

Q. You are not positive then with reference to the date when it did go over the land.

A. I feel pretty positive that it was all completed by the 10th of July from Carrington to New Rockford.

Q. It is on your recollection of the fact, that you make the statement of the fact, and not from any recollection of the time it went over this land?

A. Yes sir?

Redirect examination.

Mr. McCue:

Q. When you stated on cross examination that it was your opinion that the grade of the railroad was constructed across the land in question, do you mean that it was your recollection?

50 A. Yes sir, I mean that it was my recollection that the work was completed by the 10th of July.

Q. You recollect that by reason of your connection with the road, having contracts for grading?

A. Yes sir.

Q. Did you say that your recollection is that it was completed across the land in question by the 10th of July, and that it was started sometime before that?

A. Yes sir.

There was also offered and received in evidence on behalf of the plaintiff a deposition in words as follows, to-wit:

Deposition of B. P. Tilden.

Q. Your present occupation?

A. I am a Civil Engineer.

Q. What was your occupation in the years 1882 and 1883?

A. I was then a Civil Engineer in the employ of the Northern Pacific Railway Company.

Q. What particular branch or line were you on?

A. I was on the branch called the Jamestown Northern Railway.

Q. Can you identify that profile?

A. Yes sir.

Q. What is that?

A. It is a profile of a portion of that road through section six (6) township (147) North Range (66) W.

Mr. Parsons puts in Plaintiff's Exhibit (6).

Q. What particular part of section (6) is this through?

A. Well sir, it crosses the section from South to North. That is as nearly as I can tell. I think it is the western half of the section.

Q. Looking at the profile what quarter of the section would you say it went through?

A. My impression is that it is the *w*outhwest and northwest Quarters.

Q. I think you said Mr. Tilden that you were in charge of the

construction of the Jamestown and Northern Line of Railway which was a branch of the Northern Pacific.

A. Yes sir.

51 Q. I have three documents here that I want you to look at and tell me whose signature it is attached to them?

A. These documents are entirely in my own handwriting and signed by me personally.

Mr. Parsons puts in Plaintiff's Ex. No. 1.
Mr. Parsons puts in Plaintiff's Ex. No. 2.
Mr. Parsons puts in Plaintiff's Ex. No. 5.

Q. Mr. Tilden, will you please look at these documents and tell me when the road was graded between Stations 2695 and 2744?

A. Ex. 1 shows that grading was in progress during the month of October in 1882 and Ex. 2 shows that the grading between these Stations was completed on or prior to the 31st day of May 1883.

Q. After having refreshed your memory from these Ex-'s 1 and 2 what do you say in regard to the grading from your own personal knowledge?

A. I say that the grading between these stations had been completed on or before the 31st day of May 1883 and that the statements in the papers are correct.

Q. Will you please explain an item at the foot of Ex. 2 "means final estimate"?

A. This at the end means that items against which this little tick is made are a final estimate, that is to say:—*h*tat the amount of the grading required by the engineer on the portion so noted has been entirely completed by the contractor and is in such condition that he may then be paid in full for that portion of the work.

Q. I understand by that, that wherever that tick is made against the work that the grading is ready for the steel?

A. Yes, that is what is intended.

Q. Was that grading completed between stations 2695 and 2744?

A. It was on the 31st day of May 1883.

Q. Mr. Tilden, refreshing your memory from Ex. 5 and also from your personal knowledge when was the steels laid between these stations?

A. That on or before the 13th day of August 1883 the ties and steels had been laid.

52 Q. Looking at this blue print Ex. 6, will you indicate the section of land between stations 2695 and 2744?

A. This Blue Print shows that mile of the said Railroad which lies over and crosses Sec. 6 of township 147 of range 66 W.

Q. Can you identify this land the S. W. ¼ Sec. 6 Township 147 Range 66 W. as shown on the blue print Ex. 6 as being substantially between Stations 2695 and 2722 and being part of the Jamestown and Northern division of the Northern Pacific Railway as shown upon Ex. 1 and 2?

A. Yes.

Q. Having refreshed your memory from all the Exhibits put in you say from your own recollection and knowledge that the grad-

ing of this Railroad was completed through the S. W. ¼ Sec. 6 in Township 147, Range 66 W. in Foster County on or before the 31st day of May 1883?

A. Yes.

Q. Were you in charge of the work at the time?

A. Yes.

GEORGE H. ESTABROOK being called as a witness on behalf of the defendant and first duly sworn testified as follows:

Testimony of George H. Estabrook.

Q. State your name.

A. George H. Estabrook.

Q. Where do you live?

A. Carrington, Foster County, North Dakota.

Q. How long have you lived in Foster County?

A. "26 years.

Q. When did you come here?

A. In 1882.

Q. Were you living in Foster County throughout the year 1883?

A. I was breaking my farm during that summer.

Q. How far is that from Carrington?

A. My farm is just 8 miles from Carrington.

Q. How far from Barlow?

A. Within a mile of Barlow.

Q. When did you enter that land?

A. We located on it in 1882. Didn't file on it because we couldn't until the fall of 1884.

Q. Did you make your settlement in 1882 or 1883?

A. We put up shanties in September and October, 1882.

Q. You were living then on this land in 1882?

A. We had the shanty there. We were farming below here.

Q. You were living in that vicinity in 1883?

A. Yes sir.

Q. Did you at that time know Frederick G. Barlow the husband of Harriet A. Barlow, the defendant?

A. Yes sir.

Q. When did you first become acquainted with Mr. Barlow?

A. Some time in the spring of 1883.

Q. Did you know of the time of his settlement upon the land involved in this action?

A. I knew when the lumber was hauled.

Q. You were personally acquainted with him before that time?

A. Yes.

Q. Do you know when he built his house there?

A. I was at work close by there. We were breaking prairie. I think that the lumber was hauled there the last of May or first of June and the building was commenced soon afterwards. Mr. Barlow done all the work himself.

Q. Were you up there more or less during the course of the building?

A. Yes all summer and fall.

Q. About how far from that building did the line of the Jamestown and Northern Railway as afterwards constructed extend?

A. About 100 feet.

Q. At the time that building was in progress and at the time the building was finished had the railroad been constructed in any part over that land?

A. No sir.

Q. Had there been any surfacing or any grading or anything in the way of construction work done at the time the building was finished and at the time Mr. Barlow went to living on that land?

A. No sir, there was nothing done on that quarter section at all until in the fall.

Q. Were you there at the time the work was commenced on this quarter section of land that he took as his claim, the SW¼ of 6, township 147, range 66?

A. I don't think I was. I think they commenced after we left.

Q. About what time did you leave there?

A. About the middle of August 1883.

54 Q. At that time no construction work had been done on that land?

A. No, not on that quarter section at all.

Q. Did you during that year observe the construction work of the Jamestown & Northern?

A. Yes we were passing up and down the line all the time from Carrington up.

Q. Did you notice and do you remember to what point they had run at the time you left that section?

A. Some time in the last of May they started a camp just north of the big slough, probably 60 or 80 rods; and the work was done from there south. They done the work on the big slough, on the big dump at the big slough. They had all the teams working there until away long in the summer. I think they had gone further north at the time we left; I think about half way to Barlow.

Q. How far from Carrington is this big slough?

A. About four miles.

Q. It would be about the same distance from this land of Mr. Barlow's?

A. Yes about that This land of Mr. Barlow's is a quarter of a mile north of the extreme limit of the Village of Barlow. That would make it nearly eight miles and a half from Carrington.

Q. Do you remember about the time this camp was removed north from the big slough?

A. After they had got the bulk of the work done at the big slough, there was considerable cuts in there, a part of the camp went up about two miles.

Q. Two miles north of the big slough.

A. Yes, and I think the rest of the camp remained there.

Q. Was this camp two miles north of the big slough at the time you left there in August?

A. Yes.

Q. At that time had any construction work been done north of there in Foster County?

A. No sir.

Q. All done south?

A. I think part of the camp went to New Rockford and worked south.

Q. That was commenced in the spring?

A. Yes sir.

55 Q. Had that been constructed south as far as Mr. Barlow's land at the time you left there?

A. No there was no work done at all on that quarter section as late as the middle of August that year.

Q. Was there in August that year any signs or evidence on Mr. Barlow's land of a permanent construction on Mr. Barlow's land?

Mr. McCue: Objected to as calling for a conclusion and opinion of witness, not stating any fact.

A. There was nothing visible.

Cross-examination.

Mr. McCue:

Q. Have you any distinct recollection of the late Mr. Barlow constructing his house upon the land in controversy?

A. I have it only from perhaps something we were doing ourselves on the land. I know Mr. Barlow in the spring and summer, got acquainted with him and we broke some prairie for him for a garden and I judge from that somewhat.

Q. You don't want to be understood as being definite as to the particular dates at this time of the year.

A. No, not the exact date.

The Court:

Q. How close would you think you would be certain to come, a week or a month?

A. Within a month.

Mr. McCue:

Q. Isn't it true that previous to July 22nd 1883 that the Northern Pacific had camps north of Barlow working on the grade?

A. That I can't say because I never went further than the north line of section 6.

Q. Did you notice any stakes along the right of way over this land in the spring, in June of 1883, of permanent survey?

A. Didn't notice any.

Q. Would you say that these stakes were there?

A. No, I wouldn't say they were there.

Q. Would you say they were not there?

A. I would say, I didn't notice them at least. We were exam-

ining along the line all the time looking for something along
56 that line because my daughter had a claim below there.

Q. It was true that the Northern Pacific Railway Company were grading south of Barlow in the early spring of 1883.

A. When we arrived at our farm and while we were working in May, about the 16th or 18th of May they were grading at the big slough. I don't know whether they had moved north at all until perhaps a month later; but I know they had moved just across the slough with their camp.

Q. You made your entry upon your land in the fall or early fall of 1882?

A. We put up our shacks there, we couldn't enter anything because the land hadn't been surveyed.

Q. You built your shacks and attempted to make your settlement.

A. We did, yes sir.

Q. At that time you knew there was a survey of the railway extending north of Carrington and along the line where the railway is now located in the fall of 1882.

A. No sir I didn't know that, and there wasn't I don't think.

Q. You knew it in the spring of 1883?

A. Yes, when we went there.

Q. You knew this line of road had been surveyed north, through the place now known as Barlow.

A. Yes sir.

Q. It is also true that on July 22nd, 1883, the Northern Pacific Railroad company had a permanent survey across the S. W. ¼ of section 6 township 147, range 66.

A. I don't think it, and I don't think there were any visible signs of it. There might have been those lath stakes that they some times put down to be shifted about; but I don't think there were any permanent stakes there during that spring at all.

Q. You don't want to be understood as saying these stakes of the permanent survey were not on this land on the 22nd day of July in 1883 do you?

A. I say I didn't notice any.

Q. You don't want to be understood as saying these stakes
57 were not in fact there at the time?

A. I say there was no visible signs of it.

Q. Do you mean there was no visible signs; or do you mean to say you did not pay any particular attention to theat fact on this particular quarter?

A. The grass was growning and they might have been pounded down but there was nothing in sight.

Q. You didn't examine the S. W. ¼ of 6-147-66 at or about the 22nd day of July 1883 to ascertain whether these stakes were there or not did you?

A. I wasn't looking for stakes.

Q. As a matter of fact you didn't pay any particular attention to these stakes on this particular quarter?

A. No, I wasn't looking up stakes, and I don't know *what* I would have noticed any but the good big stake that they set when they go to make a permanent survey.

Q. You don't know what time the grade reached the S. W. ¼ of 6-147-66 of the Northern Pacific Railway Company?

A. No sir, we left about the middle of August and went home where we were farming at Pingree.

Q. You were farming in the spring of 1883 at Pingree in Stutsman County?

A. Yes sir.

Q. That is about *the* 29 miles from the land in question?

A. Yes as much as that.

Q. Therefore you were not continually or for any great length of time on your land near Barlow during the early summer of 1883.

A. I was there from about the 16th of May until the 15th of August continuously.

Q. There was no particular reason that you now call to mind that you had for going *unto* the S. W. ¼ of 6-147-66 during the early summer of 1883, was there?

A. Only that Mr. Barlow was building a house there and I went up there.

Q. Where was this house located?

A. About half way between the southwest and northwest corner of that quarter section.

Q. He didn't build his house until late in the summer of 1883 did he?

A. The lumber was hauled there as I remember about
58 the first of July.

Q. The land that you located on was south and east of the land in controversy?

A. One quarter was directly south along the line of the railroad.

Q. What section?

A. Section 18, the Northwest quarter.

Q. On which quarter did you have your shack?

A. On section 8, the southwest quarter.

Q. On what quarter did you do your breaking in 1883 if any?

A. We done it on five different quarters, on 18 next to the railroad and on three quarters in 8, and one in 20.

Q. Did you notice when you were breaking in 18 the stakes of the N. P. survey?

A. I don't think I did, I don't remember it at least, it was so very little all along that quarter section that there wouldn't be any visible signs. There might have been stakes there.

Q. There might have been stakes of their permanent survey?

A. These lath stakes when they make a preliminary survey.

Q. They didn't change the survey any to your knowledge between the early spring of 1883 and the time that Mr. Barlow made settlement on his land?

A. I don't know that they did.

Q. There was no change made in the survey?

A. Not that I know of.

Q. The line of road as it now runs through there is practically on the original survey?

A. Yes so far as I know.

There was also offered and received in evidence on behalf of defendant a deposition as follows towit:

Deposition of Mike Greitel.

Q. State your name and age.
A. Mike Greitel, age 49.
Q. Where do you live at the present time?
A. Near Barlow.
Q. How long have you lived in Foster County?
A. Since the second day of April 1883.
Q. You have been here from that date, continually from that date?
59 A. Yes sir.
Q. Where did you locate at that time?
A. On the N. W. ¼ of section No. 13, township 147, range 67.
Q. That is how far from the S. W. ¼ of section 6 township 147, range 66 the premises of F. G. Barlow?
A. Two miles.
Q. Did you know Mr. Barlow?
A. Yes sir.
Q. When did you get acquainted with him?
A. Some time in June 1883.
Q. Do you know that this S. W. ¼ of section 6 is his pre-emption?
A. Yes sir.
Q. Do you remember the time that he built his house there?
A. His shack?
Q. What month of the year 1883 was that?
A. Some time in June or the first of July; some time in July before the first of August.
Q. You think he built his house on this S. W. ¼ of 6, some time before the first of August?
—. ——.
Q. Were you there at that time?
A. Yes sir.
Q. State whether or not at that time the railroad track was graded across that land?
A. I don't think so, not then?
Q. After that time?
A. Yes sir.
Q. You were there?
A. Yes sir, never left.
Q. You were there at the time the house was constructed?
A. Yes sir, there was four shacks went up at that time.

Cross-examination.

Mr. McCue:

Q. Did you pay any particular attention to the dates these shacks were built?

A. I know it was before the first of August. I know I quit breaking the first of August and I went over.
Q. You came here in the spring of 1883?
A. Yes sir.
Q. When you came here in April they were building this
60 line of road?
A. There was no sign of road.
Q. It was built south of Carrington?
A. Yes, we came into Carrington on the cars.
Q. What was the time you made settlement on your claim, what date?
A. I built the first shack up there about the first of May 1883.
Q. As soon as spring opened in 1883, the railroad company started grading north of Carrington.
A. Not right away.
Q. As soon as the ground was in shape?
A. I think they started in while I was hauling lumber, some time in May.
Q. Didn't they have different gangs along the road working in May and June?
A. I didn't notice how many gangs.
Q. You saw different gangs along the road working in May and June?
A. All I know there was two, there was one had their camp on the other side of the Big Slough, and the other camp was just on the other side of the hill, what we call Birch hill.
Q. Right near Barlow?
A. Yes sir.
Q. Did you pay any particular attention as to how the grade was being built?
A. I didn't notice it, didn't care much. At the time we measured the land in the latter part of June, I don't think there was any grading there.
Q. On what land?
Q. On 13, we measured from 13, to get the center of our land.
Q. 13 would be south of Barlow?
A. Yes sir.
Q. They could have graded on section 6 and not on 13?
A. Yes sir, they could, and could have graded on to Sheyenne as far as I know. I know at the time we measured there was no grade.
Q. On section 13?
A. Yes sir.
Q. That is about all you remember about it?
A. Yes sir.
Q. In other words you didn't pay any attention to the
61 grade or the railroad?
A. All I know is they graded at Birch Hill and at the Big Slough, and I know I got stuck in there with oxen and they laughed at me, that is why I know they graded there at the big slough.
Q. They didn't have any trains running there until in August 1883?

A. Yes sir.
Q. The irons wasn't laid along Barlow until the 5th or 10th of August?
A. It was later than that.
Q. Were they laid to Barlow by the 16th of August?
A. I couldn't tell, I know it wasn't the first part of August.
Q. About all you notice was just the men working where you would be traveling back and forth?
A. Yes sir.
Q. Your claim is on section 14?
A. Yes sir.
Q. What part?
A. Northwest quarter?
Q. That would be two miles west of the land in controversy?
A. Yes sir.
Q. What part of your quarter did you have your shack on?
A. I didn't have a shack, I had a house.
Q. Well, your house?
A. About the center.
Q. Of the quarter?
A. Yes sir.
Q. It would be two miles and a quarter at least from Section 6 to where your house was?
A. Yes sir, if you follow lines, I didn't have to follow lines then.
Q. When you went up there first in the spring of 1883 didn't you see some grading done at the Big Slough that had been washed out?
A. No, they had just started, there was a very little done.
Q. When you first went up there there was a little grading done at the Big Slough?
A. Yes sir.
Q. You wouldn't want to swear that the grade of the Northern Pacific Railroad Company across the S. W. ¼ of section 6, the land in controversy wasn't constructed the fore part of July 1883?
62 A. I don't think it was.
Q. Would you swear it wasn't?
A. I don't think it was. I went over there hunting, it was the 4th of July, and there was nothing done. I know that sure. I was up there hunting in the Patterson slough, and there was nothing done there.
Q. Where is that slough?
A. The east part of section 6. I know I could swear to that. I was over there hunting because there was always so many ducks there.
Q. Did you notice when you went up there in the spring of 1883, did you notice the stakes stuck up there?
A. Couldn't see any stakes.
Q. When was the first time you noticed the stakes?
A. I didn't notice any stakes, I noticed a camp up there.
Q. When did you notice the camp up there?
A. I couldn't tell that, I was hauling lumber, and I saw the camp up there but I don't remember when it was.

Q. Now they did this grading in different sections, they would start in one place and grade, and there would be another camp below that, and so on.

A. I don't know how many gangs they had, I couldn't watch the railroad company grade.

Q. Didn't pay any attention to it?

A. No, but I know on the 4th of July there was no grade on Section 6, because I went over there hunting.

Q. You don't remember any other time?

A. No I don't but I know there was nothing there on the 4th of July.

Q. Was the camp up there on the 4th of July?

A. I couldn't tell that either. I didn't notice exactly when they put the camp there. In the fall when they put the camp up there, I was there a couple of times.

63 Q. Did you see the men working around there on the 4th of July?

A. No sir.

Q. You didn't notice them?

A. No sir.

Q. Do you know how far up they had the grade, north of Carrington? on July 4th, 1883?

A. No I don't.

Q. Didn't pay any particular attention?

A. No sir.

Q. Do you remember how much grading they had north of Carrington on the 4th day of July, 1883?

A. No, I don't.

Q. You just remember about that one trip hunting?

A. The trip I went hunting there was no grade, and I am sure about it too.

Redirect examination.

Mr. Ellsworth:

Q. You were fairly well acquainted with Mr. Barlow?

A. Yes sir.

Q. After his house was put up you were often at it?

A. Yes sir, I got acquainted with him in Carrington?

Q. Knew him before he lived there?

A. Yes sir.

Q. You say you were there at the time his house was put up in July?

A. Yes sir.

Q. About that time you went over there frequently?

A. Yes sir, after he was there, I was there a good deal of the time.

Q. You mean you went over there nearly every day?

A. Not every day, but once a week or twice a week after he built the house.

Q. At all these times you found Mr. Barlow living there?

A. Sometimes of course he wasn't there.

Q. He made his home in this building?
A. Yes sir.

Cross-examination.

Mr. McCue:

Q. He didn't live there until the fall of 1883?
A. But he was there lots of times like all boys did, slept
64 there a night or two.
Q. He was living in Carrington in the fore part of that summer until along in the fall wasn't it?
A. I don't know whether he was in Carrington.
Q. He was in the land business here?
A. When I got acquainted with him, and when I hunted up my own land.
Q. When you hunted up your own land he was in Carrington in the land business?
A. Yes sir.
Q. He didn't commence to live permanently on the land until some time in the fall of 1883.
A. Some time in the fall.
Q. In December?
A. No.
Q. October?
A. No, I know I got lost once, and he had a light in the window, it was winter then, but there was no snow yet. He commenced to live there probably in the fall. That is, in the fall he lived there all the time.
Q. In the fall of 1883?
A. Yes sir.

Redirect examination.

Mr. Ellsworth:

Q. Previous to that time he had been out there at nights?
A. Yes sir.
Q. The same as you were staying on your place?
A. I had my family there and was breaking.
Q. He didn't have his family there?
A. No.

There was also offered and received in evidence, on behalf of the defendant, a deposition of John Buchanan, as follow-, to-wit:

Deposition of John Buchanan.

Q. You may state your name and age.
A. John Buchanan, age 61.
65 Q. You are now living in Carrington?
A. Yes sir.
Q. How long have you lived in Foster County, N. D.?
A. Since the first of May, 1883?

Q. Were you here continually during the year 1883?
A. Yes sir.
Q. From about what time of that year?
A. First day of May.
Q. Were you acquainted at that time with F. G. Barlow?
A. Yes sir.
Q. About what time did you become acquainted with him?
A. I think some time from May, July or August that year.
Q. Were you acquainted with the tract of land known as the S. W. ¼ of section 6, township 147, range 66, afterwards taken by Mr. Barlow as his preemption near the present town of Barlow?
A. Yes sir.
Q. Knew that tract of land that year?
A. Yes sir, I had my claim close to it.
Q. How far from there was your claim?
A. About two miles, I could see his place from mine.
Q. Do you know the time he put up his house on that tract of land?
A. I put up mine and finished it some time in May and his was up then, I could see his place from mine while I was building there.
Q. Was that the only settlement that Mr. Barlow made that year, the only house he put up that year?
A. I think he had one nearer me at one time, and then moved it further up some time that year, 1883.
Q. During the year 1883 up to the month of August that year, were you up and down the present line of the Jamestown & Northern Railroad?
A. Yes sir, I had to drive by the way of Scotts to get across the slough.
Q. You were up and down the present line more or less that year prior to the first of August?
66 A. Yes sir.
Q. At the time Mr. Barlow settled on this land and built his house, was the line of track of the Jamestown & Northern Railroad Co., graded across that land?
A. Not to my knowledge, I think it was not.
Q. That is your best recollection?
A. Yes sir.
Q. At what time of the year according to your best recollection was the grading done over this tract of land?
A. It was way late in the fall if it was done at all.
Q. Later than the 22nd of July?
A. Yes sir, way into September.

Cross-examination.

Mr. McCue:

Q. What section were you on?
A. Section 20-147-66.
Q. What quarter?
A. The S. W. ¼ of 20.

Q. That would be about two miles south of the land in question, and one mile east to Section 20.

A. Yes sir, about what I think, or two and a half, I never figured it up.

Q. Going up to your claim you didn't go up by the railroad?

A. Some times.

Q. Generally you went east?

A. Yes sir, straight up past Scotts, and some times went up across the prairie by the Big Slough there where the bridge is.

Q. You were in the meat business?

A. Yes sir, started in August.

Q. You don't remember the time the railroad company commenced building the grade up there?

A. They weren't doing anything that I could see from my claim.

Q. You didn't pay much attention to the grade?

67 A. Yes sir, I was watching it carefully.

Q. The land in question being two miles north and a mile west, did you have occasion to go up in that country much?

A. Yes sir, I was looking for cattle.

Q. But there were no residents up there in that country at that time that had any cattle?

A. Yes sir, there was.

Q. You didn't look for cattle until in the fall?

A. Yes sir, that is when I was looking.

Q. Mr. Barlow, in the spring of 1883 and summer was engaged in the real estate business in Carrington?

A. I didn't know him then. I stayed part of the summer u- at the claim and didn't come only occasionally to town.

Q. Until you went into the meat business in the fall you didn't come down to Carrington very often.

A. Yes sir, I hauled lumber some time in May.

Q. This place where you crossed the big slough would be about five miles south and two miles east of the land in controversy?

A. Yes sir, about that, but I went direct from there over to my claim.

Q. You couldn't see from your claim the grade on this land in controversy?

A. No sir, I couldn't see no grade there.

Q. You couldn't see the grade upon the land in controversy from your place?

A. No, but I know the grade wasn't up there between Guptil and Barlow until some time late in the fall of 1883. They were at the Big Slough they were stuck there.

Q. When did they build the grade between Barlow and Guptil?

A. In 1884, that is when there was any trains running. I couldn't see the grade nor any people working there in 1883. It wasn't done until way late in the fall any way, September or October, but I know in the summer of 1883 there was no grade

68 there. I used to cross to Jim Smith's and there was no grade there.

Q. You could say the grade wasn't built anywhere between the Big Slough and Barlow until along late in the fall of 1883?

A. Yes sir, all I was doing there was holding down my claim and a looking around, there was four shacks on that section, and you could see to Barlows, but Barlow had one shack near there on some other land, and then moved it.

Q. That is the first shack that you refer to?

A. Yes sir, that was in May or June.

Q. What is your best judgment as to what land that was?

A. It was near Barlow.

Q. The first shack you saw was nearer to your place then Section 6?

A. Yes sir, than the other one.

Q. You would say that the shack that he first built there was somewhere on section 18?

A. I couldn't tell the section.

Q. But it was nearer than section 6?

A. Yes sir.

Q. But you don't know the time he moved that?

A. No, I couldn't say.

Q. You think that was in 1884?

A. No in 1883.

Q. You think he moved it in 1884?

A. No, he removed it in the fall of 1883.

Q. Do you remember seeing the first shack in August, 1883?

A. Before August, 1883.

Q. He built the first shack nearer to you some time in 1883?

A. Yes sir, it was up before mine was up.

Q. Do you recollect seeing that shack there as late as August that same summer?

A. No, it was moved further up. There was a little store there and I bought goods from him.

Q. That was in the fall of 1883?

A. Yes sir.

69 Q. The construction train carrying the iron and stuff was started north of Carrington some time in August 1883?

A. No, they were stuck at the big slough, they couldn't get across there.

Q. Didn't any trains run north of the big slough, north of Carrington, in 1883?

A. I think not.

Thereafter on or about the 11th day of May, A. D. 1908, the foregoing Stipulation of Fact, depositions and oral testimony having been presented to the court and the case submitted by both parties thereto for judgment and decree, the court made and entered, Findings of Fact, Conclusions of Law and Order for Judgment in words as follow- towit:

The above entitled action came on to be heard before the Court, the parties in open court having waived a trial by jury and consented that said cause be tried before the Court, Ball, Watson, Young &

Hardy appearing for plaintiff and S. E. Ellsworth for defendant, and now the court having considered all the evidence and having heard the argument of counsel, finds the following facts:

I.

That at all times since the 17th day of September, A. D. 1881, the Jamestown & Northern Railroad Company was, and now is, a railroad corporation, organized under and existing by virtue of the laws of the Territory of Dakota, now State of North Dakota, and chartered to build a line of railroad from Jamestown, North Dakota, in a northwesterly direction through Stutsman, Foster, Eddy and Benson Counties to the west end of Devils Lake. After its organization as aforesaid, the said Jamestown & Northern Railroad Company authorized and directed the survey of a line of route for a railroad from a point near the City of Jamestown, in a northwesterly direction through the Counties of Stutsman and Foster, in said Territory of Dakota; said survey was commenced on the 1st day of September, 1881, and completed on the 30th day of October, 1881, and
70 in its course passed across the land described in the complaint herein. A map or plat representing such survey was prepared, and on the 5th day of October, 1882, said Company by resolution of its board of directors adopted said line of route so surveyed and as represented on said map as the definite location of a section of its line of route between the points mentioned.

II.

Thereafter said Jamestown & Northern Railroad Company transmitted to the Secretary of the Interior a copy of its articles of incorporation certified by the Secretary of Dakota Territory; also a certificate of its organization, under the laws of the said Territory of Dakota, made by its Secretary, and an affidavit of its president, designating the officers of said corporation, all of which papers were received in the Department of the Interior on January 26, 1883.

III.

The land in controversy in this action is situated in the land district of the United States Land Office at Fargo, and has been so situated at all times. On June 7th, 1893, the records of the United States Land Office at Fargo, North Dakota, were destroyed by fire. At this time the records of the Land Office do not contain any profile or map of plaintiff's railroad over the land in question. Tract Book No. 15, of said Land Office, is a copy of the Original Tract Book which was destroyed by fire on June 7th, 1893, which said copy now contained in the Land Office at Fargo, was furnished to said office by the General Land Office of the United States, and was made up from the records there kept. Upon such tract book No. 15, and in the plat therein contained relating to township 147, range 66, there is traced across said plat in red ink marking, a line extending through said township, which line running upon said course, bears small cross marks such as is generally used in map making to in-

ate a railroad, and which line also has connected with it in red ink the words, "Jamestown Northern", with a red ink arrow pointing north parallel with said line. In the same tract book No. 15, the other plats of townships both north and uth of the one last referred to, are found similar lines with similar arkings, and it all put together shows a continuous line of some- ing apparently indicating a railroad and which is called "James- wn Northern". In the operation of United States Land Office, original documents such as homestead entries and homestead and e-emption proofs are regularly forwarded by the local land office the general land office at Washington, where the same are kept original records.

A profile and map were made containing the following endorse- ents and no others, namely: "Part of map of definite location of mestown and Northern Railroad from Junction with Northern acific Railroad to north line of Foster County, Dakota Territory, rainerd, December 30th, 1882. P. H."

TATE OF MINNESOTA,
County of Crow Wing, ss:

A. Anderson, of Brainerd in said County and State, being duly worn, says that he is the engineer in chief of the Jamestown and Northern Railroad Company; that the survey of the line of route f said road from its junction with the Northern Pacific Railroad, o the north line of Foster County, and Territory of Dakota, was nade under his direction as engineer in chief of the Company, and nder its authority, commencing the 1st day of September, 1881, nd ending on the 30th day of October, 1881, and that such survey s accurately represented on the accompanying map.

A. ANDERSON,
Engineer in Chief.

Subscribed and sworn to before me this 28th day of December, 882.

RICH REIS,
Notary Public.

I, George Adams, do herrby certify that I am the president of the Jamestown and Northern Railroad Company; that A. Anderson, of Brainerd, who subscribed the foregoing affidavit, is the chief engineer of the Company; that the survey of the line of route
72 of *of* the company's road as accurately represented on this map, was adopted by the company by resolution of its board of directors, on the 5th day of October, 1882, as the definite location of the road, from its junction with the Northern Pacific Railroad to the north line of Foster County, in Dakota Territory, and that the map has been prepared to be filed for the approval of the Secretary of the Interior in order that the Company may obtain the benefit of the act of Congress, approved March 3, 1876, entitled,

"An Act Grainting to Railroads the Right of Way through the Public Lands of the United States."

GEO. H. ADAMS,
President of the Jamestown & Northern R. R. C-.

Attest:
SIDNEY STARBUCK,
[SEAL.] *Secretary.*

Z. B. S., Department of the Interior, June 26, 1883. J. K. McG.
Approved subject to any existing rights of the Northern Pacific Railroad Company.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., April 29, 1897.

I, Binger Hermann, Commissioner of the General Land Office, do hereby certify that the annexed tracing is a true and literal exemplification of a part of a map of definite location of the Jamestown and Northern Railroad, approved by the Secretary of the Interior, on June 26, 1883, and now on file in this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed at the City of Washington, on the day and year first above written.

[SEAL.] BINGER HERMANN,
Commissioner of General Land Office.

That the map of definite location above referred to, and approved by the Secretary of the Interior on June 26, 1883, was filed in the United States Land Office at Fargo some time during the
73 month of August, 1883.

IV.

By deed of conveyance properly executed and delivered, the said Jamestown & Northern Railroad company duly conveyed to the plaintiff herein, on April 21, 1898, the line of railroad of the said Jamestown & Northern Railroad Company, including the road as constructed over the land described in the complaint herein, and including all of the right, title and interest of the said Jamestown & Northern Railroad Company in and to the right of way occupied by it over the land described in the complaint, and that thereafter said deed of conveyance was duly recorded in the office of the Secretary of State of North Dakota, and that the plaintiff herein has succeeded to all the rights of the said Jamestown & Northern Railroad Company, if any it had, in and to the right of way occupied by the defendant over the land mentioned in the complaint; that the southwest quarter (SW¼) of section six (6), township one hundred and forty seven (147) range sixty six (66), Foster County, Dakota Territory, was public land of the United States; said tract was surveyed by the government some time prior to October 2d, 1884, and on said last mentioned date the plat of survey thereof and of the

township in which said quarter section is situated, was recorded in the United States Land Office at Fargo, North Dakota.

V.

Plaintiff has not, nor did its predecessor in interest at any time institute proceedings or resort to any process whatever under the state or federal laws, to condemn a right of way across said land, or to divest defendant or her predecessors in interest of her or their title, or any predecessory claim that she or they might have to said land, other than the filing of the map of definite location, as hereinbefore set forth. Plaintiff and its predecessors in interest, the Jamestown & Northern Railroad Company, have taken for use as a right of way upon said land a strip 200 feet wide, being 100 feet
74 on each side of the center line of its said railroad, and extending across said land, and which said strip includes — acres; defendant and her predecessors in interest have not at any time consented to the taking or use of said land by plaintiff, and has not received any compensation for said taking or for the injury and damage, if any, inflicted thereby.

VI.

On and prior to the 22d day of July, A. D. 1883, the land in controversy, towit: southwest quarter (SW¼) of section six (6) in township one hundred and forty seven (147) north of range sixty six (66) West of the Fifth Principal Meridian, was unsurveyed public land of the United States, agricultural in character, not reserved from sale and was subject to settlement under the pre-emption law of United States then in force. On said 22d day of July, A. D. 1883, Frederick G. Barlow was a citizen of the United States, over the age of twenty-one years, had never had the benefit of the pre-emption laws of the United States, was not the proprietor of 320 acres of land in any state or territory, had not quit or abandoned his own land or his residence thereon to reside on the said land above described and was, in all respects, legally qualified to initiate proceedings under the pre-emption laws of the United States to obtain title to 160 acres of land, agricultural in character, from the public lands of the United States.

VII.

On said 22d day of July, A. D. 1883, intending to make entry of the said land hereinbefore described when the same was surveyed, and to acquire title to the same by virtue of compliance with the pre-emption laws of the United States, said Frederick G. Barlow settled upon said land and took up his residence thereon. At the time of such settlement there was not a railroad track or line of railroad in operation across said land at any place nor had the plat or profile of the section of railroad extending across said land hereinbefore referred to been filed in the United States District Land Office at Fargo.

75

VIII.

From the date of his said settlement, said Frederick G. Barlow continuously resided on said land and made the same his home and cultivated and improved the same until a survey thereof was made; and on the 8th day of October, A. D. 1884, and within 90 days after the receipt of said District Land Office of the approved plat of the township embracing his said pre-emption settlement, said Frederick G. Barlow filed in said District Land Office at Fargo a written statement describing the said land so settled upon by him and declaring his intention to claim the same in accordance with the pre-emption laws of the United States, alleging settlement upon said tract as of the 22d day of July, A. D. 1883, as aforesaid.

IX.

Thereafter, having continued his residence upon and improvement of said land, according to law, on or about the 6th day of July, A. D. 1885, after due notice of his intention so to do, said Frederick G. Barlow made final proof of his entry, settlem-*tn*, residence upon and impr-ement of said land as aforesaid and the payment required by law and submitted the same to the register and receiver of said District Land Office at Fargo; and on said 6th day of July, A. D. 1885, received from said District Land Office a final certificate of entry of said land. Thereafter, pursuant to the said settlement, entry of said land and final proof of said Frederick G. Barlow upon said land, as aforesaid, there was issued and delivered to him by the Government of the United States, a patent, dated November 7, A. D. 1888, grainting and conveying to him in absolute fee simple the said land by the description hereinbefore given, without limit, reservation or deduction of any kind or to any extent whatever.

X.

Said Frederick G. Barlow continued to hold the said land under the grant and title thereto acquired by him as hereinbefore set fort-

76 until the time of his death in or about the year 1901; at which time he was with the defendant herein, occupying said land as a homestead under the law of this state. The defendant is the widow and sole heir and devisee of said Frederick G. Barlow and is still occupying said land as her homestead and is invested with all estate and title thereto acquired and held by said Frederick G. Barlow at the time of his decease.

XI.

I further find that the profile and map referred to in the third finding were in fact filed in the local United States Land Office at Fargo, North Dakota, being the Land Office for the District in which said land in controversy in this action was situated, at some time prior to June 26, 1883, and was by the officers of said Land Office transmitted to the Commissioner of the General Land Office at Washington, D. C.

XII.

That prior to May 31, 1883, the said Jamestown & Northern Railway Company completed the grading of its line of railroad through over and across the land in controversy in this action; that the railroad track of the said Jamestown & Northern Railroad Company over the land in controversy in this action was completed between the 10th and 15th days of August, 1883, and ever since said time the said line of railway has been continuously operated through, over and across the land described in these findings.

I also make and find the following

Conclusions of Law.

I.

That the plaintiff is the owner, for a right of way for railroad purposes, of a strip of land two hundred (200) feet in width, that is to say, one hundred (100) feet on each side of the center line of said railroad as the same has been heretofore constructed and is now in operation over and across the land hereinbefore described, towit: The southwest quarter (SW¼) of section six (6), township one hundred and forty seven (147), range sixty six (66), Foster County, North Dakota.

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II.

That the defendant claims some interest or estate in said strip hereinbefore described, but that such claim is without foundation or merit.

III.

That decree should be entered herein adjudging and decreeing that the plaintiff is the owner of the strip of land through said quarter section of land as hereinbefore described; that the claims of the defendant thereto are null and void; that the defendant be decreed to have no estate or lien in or upon said property; that the plaintiff's title be quieted as to such claims of the defendant and that defendant be forever, debarred and enjoined from further asserting the same; that plaintiff recover possession of any portion of said premises now in the possession of the defendant or the right of possession whereof is claimed by the defendant; also that plaintiff have judgment for its costs and disbursements herein.

Let judgment be entered accordingly.

EDWARD T. BURKE,
Judge of the District Court.

Dated May 11th, 1908.

Thereafter on the 14th day of May, A. D. 1908, the court made and entered a judgment and decree herein in words as follows towit:

Judgment.

Upon the Findings of Fact, Conclusions of Law, and Order for Judgment, duly made and entered herein, and upon motion of Messrs. Ball, Watson, Young & Hardy, attorneys for the plaintiff, it is by th- court adjudged determined and decreed as follows:

1. That plaintiff is the owner, for a right of way for railway purposes, of a strip of land two hundred (200) feet in width, that is to say, one hundred (100) feet on each side of the center lin- of said railroad as the same has been heretofore constructed and is now in operation over and across the following described land, towit: The southwest quarter (SW¼) of section six (6), township One Hundred forty seven (147) North of Range Sixty six (66) west, in
78 Foster County, North Dakota.

2. It is further adjudged and decreed that the claim of the defendant in and to the land hereinbefore described is without foundation or merit.

3. It is further adjudged and decreed that the claim of the defendant to the land herein described is null and void; that the defendant has no estate or lien in, to or upon said property; that plaintiff's title is quieted as to such claims of the defendant and that defendant be and she is hereby forever debarred and enjoined from further asserting such claim to said property; that plaintiff recover possession of any portion of such premises now in the possession of the defendant, or the right of possession whereof is claimed by the defendant.

4. It is further adjudged that plaintiff have judgment against the defendant for its costs and disbursements herein which are taxed at thirty seven and n-/100 dollars.

Witness, the Honorable Edward T. Burke, Judge of the District Court within and for the County of Foster, North Dakota, this 14th day of May, 1908.

[SEAL.] S. J. MALEN, *Clerk.*

Thereafter, there was issued by the court and served by the attorney for the plaintiff upon the attorney for defendant an order to show cause in the above entitled action in words as follows towit:

Order to Show Cause.

Upon the annexed affidavit, and upon all the files, records, and proceedings herein, it is by the court ordered as follows:

That defendant show cause before this court at the Court House in Carrington on the 7th day of August, A. D. 1908, at 10 o'clock in the forenoon, or as soon thereafter as counsel can be heard, why an Order should not be made herein, vacating and setting aside findings of fact, Conclusions of Law, Order for Judgment,
79 and Judgment herein, upon such reasonable costs against plaintiff as may be adjudged by the Court, and also, why,

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at the same time, the plaintiff should not be relieved from that portion of the stipulation of fact herein set forth in the affidavit upon which this application is made; and why said stipulation of fact should not be modified by excluding and striking out therefrom. the last clause of the 7th paragraph thereof; or, at the option of the defendant, why all of said stipulation should not be vacated and set aside, both parties being relieved from all matters therein set forth; and why plaintiff should not be awarded any further relief equitable or otherwise, to which, under the circumstances, it may be entitled.

Let this Order, together with the Affidavit upon which the same is issued, be served forthwith upon defendant's attorney. That plaintiff's time for serving amendments to defendant's proposed statement of the case, is hereby extended until after the hearing upon this Order to Show Cause.

E. T. BURKE,
Judge of the District Court.

Dated July 25, 1908.

The affidavit referred to in said order to show cause and attached thereto and served therewith is in words as follows:

J. S. Watson, being duly sworn, on his oath deposes and says as follows:

That he is now, and ever since the commencement of the above entitled action, has been one of the attorneys for the plaintiff therein, and that although said cause was begun in 1903, the trial thereof was not pressed by either side, and the same was not finally disposed of by judgment, until the latter part of May, 1908; that said cause was tried upon a stipulation of certain of the facts pertinent to the issue, and also upon certain depositions and testimony taken pursuant to notice; that the taking of testimony was concluded as deponent is informed and believes, on or about Feb. 19, 1904, which was about four years prior to the entering of Judgment.

80 That soon after the commencement of said action, deponent and Mr. S. E. Ellsworth, the attorney for the defendant, had some talk in relation to the matter of a stipulation covering matters which were largely of record, and which would be necessary to prove upon the trial of said cause, both upon the part of the plaintiff, and also upon the part of the defendant.

On Oct. 1, 1903, deponent's firm addressed the following letter to defendant's attorney:

"DEAR SIR: We observe that you had some correspondence with our Mr. Watson, at the time the above action was commenced, relative to stipulating the facts; and inasmuch as there can be, as we view the matter, very little, if any dispute regarding the facts in the case, it seems to us that such a stipulation should be entered into by the parties. Upon our side, we should like to have the stipulation cover the same facts, so far as relevant, which appear in the case of J. & N. R. R. vs. Jones, the filing of its articles of incorporation, approval of selection of lands, date of grading done in Foster County, and over the land in question, etc. We assume

CLOSE IN CENTER

that you want the stipulation to cover the date of Barlow's entry upon the land, his final proof, and residence thereon, and similar facts. If this proposal for a stipulation, covering the above matters, meets with your approval, please let us know at once, and send to us, if you will, a statement of the facts which you will desire to have included in the stipulation, on your side. We will then prepare the stipulation, including such facts, if we can agree, and send it to you for your examination and approval. As the time is short, we will appreciate an early reply.

Inasmuch as this is a court case, we would suggest the question whether it is necessary that the case be tried at the term itself, and whether it would not be more convenient, provided stipulation is made, to take the case up at such time as will suit your convenience, ours and the convenience of the court at Jamestown, in the early future."

In reply to such letter, deponent received from defendant's attorney, the following letter, dated Oct. 5, 1903:

"GENTLEMEN: Replying to yours of the 1st instant:—My recollection of my correspondence with Mr. Watson is that the only fact in dispute in the above case, is as to the time the grading was done across the Barlow land. All other facts and data referred to in the pleadings can be admitted. I will stipulate all data which we have gone over in R'y. Co. vs. Jones. On your part I shall desire an admission of all material facts set out in the reply with reference to the dates of Mr. Barlow's settlement, his final proof and patent and also with regard to his residence on and improvement of the land. If you will draw a stipulation including these matters and forward to me, I will sign and return."

The case of R'y. Co. vs. Jones referred to in said letters is the action which was tried in Stutsman County, N. Dak. and which was disposed of by appeal to the Supreme Court. The opinion upon which appeal is reported in 7 North Dakota 619; and further
81 appeal was taken to the U. S. Supreme Court, and the decision therein is found in 177 U. S. p. 125. Thereafter this deponent prepared a proposed stipulation of facts covering the matters which are set forth at length in paragraphs 1-2-3-4 and 5 of the stipulation of facts herein; the same were submitted to defendant's attorney as containing the matters of record, formal proof of which plaintiff desired to be embodied in the stipulation; thereafter, def'ts atty. prepared and attached to the stipulation paragraphs 6, 7, 8, 9, and 10. On or about Nov. 8, 1903, said stipulation was signed by the attorneys for both parties. The purpose of said stipulation was to bring into the record facts which were largely matters of record in the U. S. Land Office, in the general Land Office of the U. S. and in the Office of the Sec. of the Interior; that reference is hereby made to the abstract in the case of Jamestown & Northern R. R. Co. vs. Jones which was used upon the appeal of said cause to the Supreme Court of North Dakota, a copy of which is herewith submitted; that in drawing the first five paragraphs of the stipulation herein, deponent followed as nearly as possible the matters as set

forth in the stipulation in the Jones case; that after the making and filing of such stipulation, the evidence in said cause was taken; but that deponent was not present at the taking of any of the same, except certain of the depositions which were taken at St. Paul. That the local attorneys for the plff. at Carrington, Messrs. McCue & Leslie, afterward Mr. T. F. McCue represented the company; this deponent did not, nor did any of his firm, have occasion to consider said cause or the proceedings therein after the making of said stipulation in Nov. 1903, down to the time of the signing of the Findings of Fact & Conclusions of Law herein, in May 1908; said cause was simply allowed to drag along altho all the testimony therein was taken and completed in 1904.

Upon applying to the District Court for the making of Findings of Fact and Conclusions of Law, deponent looked through the files in said cause, and among other things, a purported copy of the stipulation; deponent then, for the first time, noted the following being the latter part of the 7th clause of the stipulation, viz—"Nor had the plat or profile of the section of railroad extending across said land hereinbefore referred to, been filed in the U. S. District Land Office at Fargo." Deponent was not sure that the copy of stipulation was a correct one; that the language above quoted was not contained in the stipulation of facts in the Jones case; that never, until applying for the making of Findings of Fact on or about May 11th, 1908, did deponent know of the presence of such language in said stipulation; deponent did not even then give the matter any serious attention, and at the time thought the implication arising from the filing of the profile in the office of the Sec. of the Interior, would be sufficient to support the conclusion that such profile had reached the last named office through the regular channel of business, viz.—by being received through the local land office at Fargo; and proceeding upon such mistaken assumption, and in actual ignorance of whether the purported copy of stipulation found in deponent's office files was correct one, deponent prepared and presented to the Judge of the District Court, the Findings and Conclusions, and Order of Judgment herein, and upon the same being signed, caused judgment to be entered therein in favor of the plaintiff; thereafter defendant's attorney served upon plaintiff a proposed statement of the case, in which was embodied the stipulation herein; Promptly upon receiving the same, deponent wrote to defendant's attorney requesting that the original files in the case be sent to deponent for his use in preparing amendments; but because defendant's attorney was at the time busily engaged for a period of about ten days in the trial of cases at a jury term, such request was not attended to; thereafter, deponent, not having heard from defendant's attorney, wrote to the clerk of the court at Carrington requesting that the files be transmitted for deponent's use in settlement of the statement of the case, or in proposing amendments thereto; Deponent was informed by said clerk, that the files were in the possession of defendant's attorney; thereupon, upon again writing defendant's attorney upon the subject, he promptly forwarded the files to this deponent, the same

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being received in Fargo, on or about July 16th; thereupon deponent wrote defendant's attorney the following letter:

"DEAR MR. ELLSWORTH: I received the original files in the case. I had not looked over the papers until the time when Judge Burke said he would sign findings in my favor; I then looked over papers in my files and found two stipulations, the first one apparently unsigned. In the second one, and in the last clause of the 7th paragraph was the following statement:

"At the time of such settlement, there was not a railroad track laid or line of railroad in operation across said land at any place; nor had the plat or profile of the section of railroad extending across said land hereinbefore referred to, been filed in the U. S. district land office at Fargo."

The first part of the statement in regard to there being no railroad track or line of railroad, is all right; but I do not see ho- or why I ever signed a stipulation as to the non-filing of the plat or profile. The records were all burned up, and I do not see how there could be any proof either of filing or non-filing. In your letter to my firm of Oct. 5, 1903, you state as follows:

"My recollection of my correspondence with Mr. Watson is, that the only fact in dispute in the above case is as to the time the grading was done across the Barlow land; all other facts and data referred to in the pleadings can be admitted. I will stipulate all data which we have gone over in Railway Company vs. Jones. On your part I shall desire an admission of all material facts set out in the reply with reference to the dates of Mr. Barlow's settlement, his final proof and patent, and also in regard to his residence on and improvement of the land. If you will draw a stipulation including these matters and forward to me, I will sign and return."

My correspondence file does not seem to be entirely complete, but I appear to have forwarded to you the matters which I desired to be admitted upon our part; I must have wholly overlooked ever signing that portion of the stipulation inserted in your portion of the stipulation covering what Mr. Barlow did. The proper place for anything in relation to the plat was certainly in the earlier portions of the stipulation which related to the acts of the railroad company. I know you do not wish to take any advantage, or to get any advantage from anything which is not a fact in the case. If you had, or have, or can supply, any proof of non-filing of the plat, then that part of the stipulation ought to stand. I have no proof and cannot furnish any, that the profile was in fact filed on or prior to April 22nd. I am sure, I overlooked this clause, and could not have understood its presence in the stipulation, or I would never have signed it. I would not ask, of course, for any stipulation, upon the subject beyond the fact which is already in the stipulation, that all the files in the land office were burned in 1893, and hence no record proof can be furnished, either that the railway company did, or that it did not, file a profile. Kindly advise me if I am correct in my understanding of this matter, and if we can correct the stipulation in the single particular mentioned. I am certain that the insertion

of the clause referred to was a mere unintentional mistake or error, and that you would not wish the stipulation to stand when it is pointed out there must have been a mistake, and the further fact, that it is, and would have been, absolutely impossible for you in any way to prove what is said. Will you kindly, therefore, let me hear from you if we may amend the stipulation by striking out the last two and one half lines containing these words:

84 "Nor had the plat or profile of the section of railroad extending across said land hereinbefore referred to been filed in the U. S. District Land Office of Fargo."

You did not say in your letter if we might have an additional 10 days for proposing amendments, the same being caused by our delay in getting the files which were in your possession."

Please let me hear from you at once, and greatly oblige."

P. S. I have looked through stipulation and findings in the Jones case, and there is nothing there corresponding to the language in question. I certainly supposed, in signing the stipulation, that so far as the railway was concerned, I was stipulating just what I had done in the Jones case."

In reply thereto, deponent received the following letter from defendant's attorney, dated July 21st, 1908:

"DEAR SIR: Our term of the District Court was in session all of last week and as I was very busily engaged in the trial of cases I have been unable to find time to answer your letter of the 16th instant until today.

I am, of course, entirely willing that you should have the additional ten days in which to propose amendments to the Statement of the Case in Northern Pacific Railway Company against Barlow. I will ask, however, that in case you see fit to propose such amend ment that you will send me the proposed amendment as early as possible; as I wish to bring this appeal into the September term of the Supreme Court if it can be done.

With regard to the stipulation of fact, I can only say that there was no mistake made in inserting the clause to which your letter refers; on the contrary I think the stipulation as it stands very clearly expresses the attitude of both yourself and myself toward the case at the time the stipulation was made. By referring to the past history of the case you will understand what I mean.

After the action was at issue both our talk and our correspondence indicated that the only point of difference was upon the question of whether the work done by the Railway Company prior to Barlow's settlement was equivalent to the construction of a railway. The Supreme Court of the United States had then decided, in the Jones case, that a railway actually constructed and in operation was of itself sufficient notice to apprise an intending settler of the claim to right of way of a railway company. This Barlow case differed from the Jones case only in the amount of construction work actually done before Barlow's settlement. I had a communication from the Fargo Land Office stating that these records showed that the plat was filed there August 11, 1883.

In my letter to you of August 5th, 1903 I stated that "I shall

desire an admission of all material facts set out in the reply." The word "Reply" is an evident mistake as the reply in the case came from you and not from me and it must therefore refer to the answer. By reference to the answer in the middle part of paragraph 11 you will find the exact language in regard to the filing of the plat contained in the stipulation of fact. You did not object to this part being incorporated at the time for the reason that we were fully agreed that the plat was not filed until after Barlow's settlement.

Further than this, from the writing of the stipulation of fact you will note that it was made up partly in your office and partly in mine. I think your part extends to Paragraph 6th and mine commencing there and continues to the end of the stipulation. You will notice in the latter part of paragraph 3rd of the stipulation of fact which was drawn in your office this language; "the map of definite location above referred to, and approved by the Sec. of the Interior on June 26, 1883, was filed in the United States Land Office at Fargo, some time during the month of August 1883."

85 This clause is in exact accord with the clause referred to in your letter; and if there is a mistake in one there must also be in the other. As a matter of fact, there is a mistake in neither; for as I remember, your own investigation in the Land Office at Fargo, satisfied you that the plat was filed there, for the first time, some time in August 1883. This case, has, as you know, been pending in the District Court of Foster County since 1903. The evidence was not all taken in May 1905 when the case of Doughty vs. Soo Railway Company was decided in the District Court. This case was upon the same calendar with that case and would have been brought to trial then except for the understanding between counsel that the same facts were involved in this case as in the Doughty case and that when the Doughty case was finally determined it would settle*d* this case. I do not remember that you were present at the time but who ever represented your office agreed to that proposition and it was so understood by Judge Burke.

When the Doughty case was decided in the Supreme Court of the United States I brought this case to trial at the term of the district court held in Foster County in last March. Mr. McCue appeared for the Northern Pacific Railway Company when the last evidence taken was submitted. There was no disagreement from him or in fact from anyone to my proposition that the law of the case had been settled by the decision in the Doughty case; and Judge Burke directed me to prepare findings and a judgment in favor of Mrs. Barlow. Before I had done so, however, I received a letter from your office, written, I think, by Mr. Hardy, requesting that I allow the matter to stand open until your return which I think he stated would be about May 1st. I consented to this expecting that in case you had anything to offer I would be informed of it. The first notice of your return I received was a notice of entry of judgment in favor of the railway company. The findings which you sent, to my great surprise, contained one to the effect that the profile of route had been filed in the Fargo, Land Office at some time prior to June 26, 1883. I at once recognized that this was directly in

the face of the stipulation of fact; but owing to the fact that I had received no notice of a change of mind on the part of the court with reference to the findings and judgment, I did not think it necessary to call either the attention of the judge or yourself to this obvious contradiction.

I have perhaps gone to unnnecessary length to explain the circumstances surrounding this stipulation of fact as from my best recollection I view it. You will understand, however, that it is impossible that I should consent to any change in the stipulation of fact. If I had any reason to believe that the map of definite location was filed in the local land office before Barlow's settlement I would not, of course, have demanded your action. It was because the records of the land office showed that it was filed there after his settlement that I interposed a defense upon the point that the construction of the railroad at the time of his settlement was not such as to give him notice of appropriation of the land by the railroad company."

In reply thereto deponent wrote defendant's attorney on July 22nd as follows:

"DEAR SIR: I have carefully considered yours of the 21st. I did not suggest or ask any change in the latter part of the third paragraph of the stipulation as to the filing of the map in the local land office on June 26, 1883; neither did I suggest or ask any stipulation that the map was filed in the local land office in June; I have not had any proof as to whether it was or was not filed prior to its approval by the Secretary of the Interior. If you have or could get any proof that it was not filed, I will concede the point. But
86 if, as I understand it, no proof is available to either of us, either that the map was filed or that it was not filed prior to its approval by the Secretary, then it seems to me there is no reason why that should be stated as a fact. I am constrained to think I totally overlooked this part of the stipulation when I signed it. The local land office records were all burned up in 1893, and I never had any knowledge, information or belief on the subject of the filing of the map.

I wish, therefore, again to inquire, whether in view of this fact, you do not think it is right, that the stipulation should be corrected in the single part referred to. You will understand again I am not suggesting any change that would state that it was filed; I object simply to the stipulation saying that it was not filed, when there is no proof available, as I understand it, in support of such a statement.

I would be greatly obliged if I might hear from you speedily."

In reply to such last named letter, deponent received from defendant's attorney the following letter written under date of July 23, 1908:

"DEAR SIR: Your letter of the 22d instant is just received and contents noted.

I cannot consent to any change in the stipulation of fact for the

reason (1) there was no mistake made by either of us at the time original stipulation was signed; and (2) to make the change you suggest, at this time, would unsettle the theory upon which the case has been treated from the beginning.

I note that you do not desire any change in the stipulation at the end of the third paragraph where it states that the map was filed in the local land office some time in August 1883. This means if it means anything that the map was not filed there before that time. If it was not filed before that time it was not on file on July 22d, 1883 the time of Barlow's settlement.

As I wrote you the records of the local land office, in some place, show that the map was filed there August 11th, 1883. This is proof that it was not filed before that time just as the date of filing in the general land office shows that it was not filed there before June 26, 1883.

I expect simply that a statement of the case when settled in this action shall show the facts as they exist and as they have been understood by counsel from the beginning. As I wrote you before, this action would not have been defend*a*ned if there had not been what I considered a conclusive showing that the map of definite location was not filed in the local land office before Barlow's settlement. Having so treated the case from the beginning, you will understand why I cannot now consent that the entire ground of defence be swept from under my feet, by a change in the stipulation of fact."

Deponent further says that the statement of facts set forth in the letters written by him to defendant's attorney, are correct and true to the best of his knowledge, information and belief.

That the U. S. Land Office, and the records therein, at Fargo, N. Dak. were burned up in the fire of 1893; that deponent has made search through said files as are now of record therein, and is not able to find, and has not been able to find, therein, any proof or evidence either that the profile in question was or was not
87 filed in said office prior to the time of its approval by the Sec. of the Interior of June 26, 1883; that by reason of the destruction of the original records of said land office at Fargo, as aforesaid, deponent believes there is no evidence available to show whether said profile was, or was not filed in said local land office prior to June 26, 1883; that whether the same was, or was not filed in such local land office prior to June 26, 1883 is not susceptable of any proof, according to the best knowledge, information and belief of this deponent; that it is fair argument that the filing of the profile of said map in the office of the Sec. of the Interior on June 26, 1883, established, by implication, the due and proper filing of said map in the office wherein the same was by law required to be filed in the first instance, viz.—in the said Office at Fargo.

Deponent further says, the validity of the judgment entered herein, depends upon two ultimate facts:—First, as to whether said map was filed and approved by the Sec. of the Interior as required by act of Congress, approved Mar. 3, 1875. And, secondly, upon whether the work done by the railroad company across said land;

which work was done prior to the Barlow settlement, was sufficient, in law, to bring this case within the principles announced by the U. S. Supreme Court in the Jones case; or was insufficient for that purpose under the principles announced by the same court in the case of Minneapolis, St. P. & Soo Ste. Marie Ry. Co. vs. Doughty, 208 U. S. 251.

Deponent further says, that in signing said stipulation containing the language above referred to, *he*, by mistake and inadvert*a*nce admitted something which is not, and which cannot be proved to be, and is not a fact; that such stipulation was signed by deponent in the belief that it followed the stipulation in the Jones case in all matters pertaining to the rights of the railroad company under the Act of Congress of 1875; but by mistake, inadvert*a*nce and neglect,
he failed to note, or if he did note, failed to comprehend the
88 meaning and significance of said language as was embodied by defendant's attorney in the concluding portion of the 7th paragraph of said stipulation; and that, as above stated, deponent did not discover, understand nor comprehend the scope and meaning of said language until the time of the service of a proposed statement of the case herein; that deponent, as hereinbefore set forth, has applied to defendant's attorney for relief from said stipulation, and that defendant's attorney has refused and declined to grant any such relief, or to make any change in such stipulation; that if said stipulation is allowed to stand, plaintiff will be deprived of one of the two grounds which the judgment herein might be sustained; and plaintiff would be deprived of a valuable right, through the mistake, inadvert*a*nce and neglect of its attorney.

Wherefore, plaintiff prays for the following relief:

First.

That the Findings of Fact, Conclusions of Law, Order for Judgment and Judgment herein be vacated and set aside, together with any and all costs, and upon any and all of such terms, as, in the opinion of the court, ought to be imposed upon plaintiff in connection with the granting of such relief; and plaintiff expressly offers to submit to, and pay any such reasonable costs, as, in the opinion of the court, may be awarded upon the granting of such relief.

Second.

That plaintiff may be relieved from, and that the stipulation of facts, filed herein, may be modified and changed by striking therefrom the concluding clause of the 7th paragraph thereof, being the following words therein, towit:

"Nor had the plat or profile of the section of railroad extending across said land hereinbefore referred to been filed in the United States District Land Office at Fargo." or, if the defendant so elects, that the entire stipulation may be vacated and set aside; plaintiff being willing, upon the other hand, if the defendant so elects, to
allow the said stipulation to stand, save only as to the clause
89 above set forth.

Third.

That settlement of the statement of the case herein, may be postponed, and defendant's time for proposing amendments to said proposed statement may be enlarged and extended until after the disposition of this application.

Fourth.

That plaintiff may have any and all further relief which is proper and equitable herein.

J. S. WATSON.

Subscribed and sworn to before me, this 25th day of July, A. D. 1908.

[SEAL.]

J. S. APFU,
Notary Public, Cass County, N. D.

My commission expires June 1st, 1912.

Thereafter, the said motion of plaintiff came regularly on to be heard before the Court at Valley City, North Dakota, on the 8th day of August, A. D. 1908. On which day, the defendant appeared and filed a return to said order to show cause in words as follows towit:

Return to Order to Show Cause.

Comes now Harriet A. Barlow, the defendant above named, by her counsel, in response to an order to show cause issued by this court in the above entitled action, on the 25th day of July, A. D. 1908 and returnable before this court on the 7th day of August, 1908, and as cause why the plaintiff above named should not be relieved from any portion of the stipulation of fact entered into between counsel for the respective parties to the above entitled action in any part or portion of the same; and why said stipulation of fact should not be modified by excluding or striking *of* therefrom the last clause of the seventh paragraph thereof or by striking out or excluding any part or portion of said stipulation of fact; and as cause why said stipulation of fact should not, at this time, be vacated and
90 set aside and either or both parties relieved from all matters therein set forth, presents the attached affidavit of S. E. Ellsworth, attorney for said defendant and thereupon,

Moves that the Order to Show Cause issued herein as aforesaid be vacated and set aside; and that the court make no further action in passing upon or entertaining the motion of plaintiff than to dismiss and deny the same is all its parts.

Dated August 8th, A. D. 1908.

S. E. ELLSWORTH,
Attorney for Defendant.

The Affidavit referred to in said Return to Order to Show Cause herein is in words as follows towit:

Affidavit of S. E. Ellsworth.

STATE OF NORTH DAKOTA,
County of Stutsman, ss:

S. E. Ellsworth being first duly sworn upon his oath deposes and says that he is and has been at all times since the commencement of the above entitled action, sole attorney for Harriet A. Barlow, the defendant herein named; that said action was commenced, by service of the summons herein, on or about the 3rd day of October, A. D. 1902; that shortly after affiant was retained as counsel for said defendant he began an investigation by inquiry of his client and of the United States District Land Office at Fargo, North Dakota, and of persons generally residing in the vicinity of the land in controversy with reference to the following facts upon which he realized the defense of this action depended; (1) the date of the settlement of Frederick G. Barlow, the decedent, to whose interest and estate in the land the defendant succeeds as heir; (2) the date when construction of that part of the line of railroad belonging to the plaintiff, extending across the tract, was completed and whether or not this road was in operation at the time of Barlow's settlement; (3) the
91 date of filing in the United States District Land Office at Fargo of a profile approved by the Secretary of the Interior of the route of the railway across the land in question.

The inquiry made by affiant in this investigation at the United States District Land Office at Fargo North Dakota, was made by means of a typewritten letter containing five questions with blank spaces following thereafter to provide space for the answer to these questions. This letter was transmitted by mail to the United States Land Office at Fargo, on or about the 21st day of October, A. D. 1903 and at the time of its transmission by affiant contained only the typewritten introduction and close to the letter and the five written questions hereinbefore mentioned with blank spaces following for the answers thereto. In two or three days after mailing the letter in this form, affiant received from the mail a letter addressed to him and contained in an envelope bearing the name of the United States Land Office at Fargo, North Dakota, the said typewritten form, with answers to the questions contained therein written in with a pen. The letter as completed by filing the answers in the manner hereinbefore described is hereto attached and marked Exhibit "A."

JAMESTOWN, N. D., October, 21, 1902.

Hon. Register U. S. Land Office, Fargo, N. D.

DEAR SIR: Will you kindly supply information with reference to S. W. ¼-6-147-66 as follows:
Name of entryman Frederick G. Barlow
Date of entry October 8, 1884, alleging settlement July 22, 1883.
Character of entry Pre-emption No. 1005.
Date of final certificate July 6, 1885.

Date of filing in your office of plat of the section of Jamestown Northern Ry. across this land August 6, 1886.

An answer upon this sheet to the above inquiries will greatly oblige,

Yours very truly,

S. E. ELLSWORTH.

92 Upon ascertaining from the letter, Exhibit "A," that the alleged date of settlement upon the land in controversy of the decedent Frederick G. Barlow was July 22, A. D. 1883, and that the date of filing in the District Land Office of the plat of the section of railway across the land was August, 6th, A. D. 1883*p* and, upon ascertaining, from persons who lived near the land during the year 1883, the date of complete construction and operation of that part of the railroad extending across the land, affiant prepared an answer in the case and served the same on counsel for plaintiff on or about the 1st day of November, A. D. 1902. This answer contained denials of the material allegations of plaintiff's complaint and a counter-claim setting out complete title to the land in the heirs of Frederick G. Barlow, deceased, which counterclaim, contained in Paragraph 11 thereof an allegation in these words, "At the time of such settlement there was not a railroad track, roadbed, or grade constructed over or across said land, nor was there on file with the Register of the United States District Land Office at Fargo, the district in which said land was situated, a plat or profile of a section of railroad extending over or across said land or any part of the same."

Previous to the preparation and service of the answer containing the clause aforesaid, this affiant had acted as counsel, at all stages of the case, for Theodore J. Jones, defendant in an action entitled Jamestown & Northern Railway Company vs. Jones, and was familiar with the decisions of the Supreme Court of North Dakota and of the Supreme *County* of the United States in that case. He knew and believed at the time of the preparation of said answer as aforesaid, that under the holding of the Supreme Court of the United States in said case of Jamestown & Northern Railway Company vs. Jones, actual construction and operation of the railway across public land was unmistakable notice of appropriation thereof — the railway company; and that in cases where such construction and operation preceded the settlement of a settler, the title of the company

93 to right of way was paramount to his. He further knew and understood that, under the law of March 3rd, A. D. 1875, the filing by a railway company, before and in anticipation of the construction of its railroad, of an approved profile of its line of route, in the United States Land Office of the District in which the land was situated, prior to the settlement of an intending settler, operates to confer title to the right of way claimed upon the railway company. In contemplation of the holdings hereinbefore referred to, affiant prepared the answer to plaintiff's complaint herein and served the same and defended against plaintiff's cause of action wholly upon the ground that at the date of the settlement of Frederick G. Barlow, as a pre-emption claimant, upon the land in controversy, there had not been filed in the United States District Land Office at Fargo, an

approved profile of route of the railroad across the land nor was there such construction or operation of a railroad across the land as would serve as unmistakable evidence of appropriation by the railway company, and operate to dispense with the filing of such approval profile of route.

After the filing of defendant's answer, the first suggestion of a stipulation by counsel of facts at issue in the case, was, according to affiant's best recollection, contained in a letter dated February 4th, A. D. 1903, and signed, Ball, Watson, & McClay, in the handwriting of Mr. John S. Watson, which letter was received by affiant from the mails shortly after said 4th day of February, A. D. 1903. This letter is hereunto attached and marked Exhibit "B" and is in words as follows:

FARGO, NORTH DAKOTA, Feb. 4, 1903.

Subject: N. P. Ry. Co. vs. Barlow.

S. E. Ellsworth, Esq., Jamestown, N. D.

DEAR SIR: Can we stipulate the facts in this case? We suppose the only matter in dispute would be that as to whether a railroad track, roadbed or grade was constructed over and across the land at the time of Mr. Barlow's settlement and filing July 22d, 1883. Can we stipulate the remaining facts? Our record shows that the map of definite location was filed with the Secretary of the Interior, though we do not have the date upon which it was so filed. It was sent by the secretary of the interior, to the commissioner of the
94 general land office January 27th, 1883, and was approved June 26, 1883. It was filed at Fargo, some time in August, 1883. We have a record of Mr. Barlow's filing which was as stated in your answer, viz., declaratory statement was filed October, 5th, 1884, and alleged settlement July 22nd, 1883.

Of course, you know that the J & N. filed its articles of incorporation etc. all as set out in the Jones case. Can we stipulate all of the facts save the matter of the date of the construction of the railroad across the land? If we can, we can take up the matter of the disposition of that point at any time that will suit your convenience, and we can each produce witnesses or make our case by depositions, just as seems most convenient. Kindly let us hear from you at your early convenience, and oblige,

Yours truly,

BALL, WATSON & McCLAY.

Dictated.

In reply to this letter on or about February 6th, 1903 affiant wrote and mailed to Ball, Watson & McClay at Fargo, North Dakota, a letter in words as follows:

JAMESTOWN, N. D., Feb. 6th, 1903.

Messrs. Ball, Watson & McClay, Fargo, N. D.

GENTLEMEN: In reply to your letter of 4th instant will say that I see no reason why a stipulation of fact cannot be made in the

Barlow case provided that you can agree that the facts as to Barlow's settlement, residence, proof and title are as set out in the answer. As you state, I think the only question in the case is whether there was such construction of a line of track at the time of his entry as to hold him to notice of the course of the definite line of the road. If you will draw up such a stipulation as you desire and send me I will consider it. Is there any reason for trying the disputed question of fact before the May term of court in Foster County?

Yours truly,

S. E. ELLSWORTH.

On or about February 9th, 1903 affiant received from the mails a reply to this letter in these words:

FARGO, NORTH DAKOTA, Feb. 9, 1903.

Subject: N. P. Ry. Co. vs. Barlow.

S. E. Ellsworth, Esq., Jamestown, N. Dak.

DEAR SIR: Replying to yours of the 6th inst., we will take up the matter of proposed findings just as soon as we get through with a present rush of court work.

Yours very respectfully,

BALL, WATSON & McCLAY,
Division Counsel.

Dictated.

According to the best recollection of affiant there was no further correspondence between counsel for the Northern Pacific
95 Railway Company and himself with reference to a stipulation of the facts at issue in the case, until about October 1st, 1903, when he received from the mails the letter of which a copy appears on page 2 of the Affidavit of John S. Watson, presented upon this application. This letter was typewritten, consisted of two sheets, and was signed in the handwriting as affiant believes, of Mr. McClay. The original letter is hereunto attached and marked Exhibit "C."

In reply to this letter affiant wrote and mailed to Ball, Watson, & McClay of Fargo, North Dakota, a letter dated October, 5th, 1903, a copy of which appears on page 2 of said Affidavit of Mr. Watson.

On or about October 7th, 1903, affiant received from the mails a typewritten letter signed, "Ball, Watson & McClay," in these words:

FARGO, NORTH DAKOTA, Oct. 6, 1903.

Subject: N. P. vs. Barlow.

S. E. Ellsworth, Esq., Jamestown, N. D.

DEAR SIR: We are in receipt of your letter of yesterday, agreeing to stipulate the facts in the above action, except as to the time of grading the road over the Barlow land. This arra-gement will suit us, and we will, with your permission, hereby now stipulate that all other facts than the above mentioned one, shall be hereafter covered

by a formal stipulation to be drawn up between us. For two reasons, however, we will ask you to consent to *that* this case *be* taken up at some near date in the future, to be hereafter fixed upon, before Judge Glaspell, at Jamestown. It is a court case, and there is no reason why this course should not be taken. The reasons we refer to are, first, that we have not yet been able to arrange for the attendance of Mr. B. F. Tilden, at the trial, he being the engineer who was in charge of the grading over this land, and by whose testimony we expect to prove the date of the grading, whatever it was. The second reason is that this case was in charge of Mr. Watson, who is at present absent in the east, undergoing treatment for his throat under the care of a specialist in New York City, and *eh* will not return until about the middle of the month, or perhaps a little thereafter. We are at present engaged in the trial of three cases, the first of which was commenced today, pending in the Federal Court of Fargo, and *and* which promise not to be finished until after the 14th instant, and we will be unable to give the necessary attention to the Barlow case. You will confer a considerable favor upon us if you will let us hear from you favorably to our suggestion to a trial before Judge Glaspell at Jamestown, by return mail, or by wire at our expense.

Yours truly,

BALL, WATSON & McCLAY,
Division Counsel.

96 This letter is marked Exhibit "D" and hereunto attached.

Affiant's reply to the foregoing letter related entirely to the time of the trial of the case and made no reference whatever to a stipulation of fact. On or about the 15th day of October, 1903, however, affiant received from the mails a letter subscribed, "Ball, Watson, & McClay, as affiant believes in the handwriting of Mr. John S. Watson enclosing certain proposed Findings of Fact, in words as follows:

JAMESTOWN, NORTH DAKOTA, Oct. 15, 03.

Subject: N. P. Ry. Co. vs. Barlow.

S. E. Ellsworth, Esq., Jamestown, N. D.

DEAR SIR: We hand you herewith enclosed *osme* proposed findings to be embodied in the stipulation. Please look them over and the grading or beginning of the operation of the road, that being left, as we understand it, to be determined after the submission of testimony upon both sides. We have shown the dates of the filing of the survey of the township, as we obtained it from the land office.

The land office records show that F. G. Barlow filed declaratory statement No. 16454 on October 4, 1884, alleging settlement July 22nd, 1883, and that he made pre-emption cash entry, or final proof, on July 6, 1885.

It seems to us that the date of settlement and the beginning of residence upon the land, should be determined by evidence, the same as the date of our constructing the grade over the land. So far as

the citizenship of Mr. Barlow, and his right to make pre-emption entry are concerned, we will, of course, stipulate that. Please let us hear from you if these matters suggested are all right. We will, of course, stipulate also all land office records that you wish to put in regarding Mr. Barlow's filing final proof, etc. Your early attention to this matter will greatly oblige.

Yours very respectfully,

BALL, WATSON & McCLAY.

Dictated.

This letter is marked Exhibit "E" and hereunto attached.

Affiant did not reply to the foregoing letter until about November 9th, 1903 at which time he wrote and mailed a letter dated on that day, in words as follows:

JAMESTOWN, N. D., November 9, 1903.

Messrs. Ball, Watson & McClay, Fargo, N. D.

GENTLEMEN: In the matter of the stipulation of fact, in N. P. Ry. Co. vs. Barlow, I have been considerably delayed by the fact that I found on taking up the matter it required greater legal
97 investigation than I expected; and further by the fact that my time has been greatly broken in by other matters. I have attached to the sheets which you sent me such further stipulation as I would suggest and have signed and transmit herewith the same. The only changes I have made in your part is in the 3rd paragraph where I have made it appear that the profile or plat was filed in the district land office at Fargo, in August 1883, instead of refiled. I believe the fact to be in this as in the Jones case, that the profile was transmitted to the Secretary of the Interior before filing in the district land office and was so filed only after its approval. I enclose copy of the added sheets which please sign and return to me if you find all correct.

Yours very truly,

S. E. ELLSWORTH.

The portion of the stipulation of fact enclosed and referred to in the letter of Ball, Watson, & McClay dated October 15th, 1903, was that part of the original stipulation now on file herein extending to and including the 4th paragraph with the exception of the words written on the margin of the first page. The portion of this stipulation referred to in the letter of affiant dated November 9th, 1903 are the following words appearing in the closing lines of the 3rd Paragraph as follows towit: "that the map of definite location above referred to, and approved by the Secretary of the Interior on June 26th, 1883, was filed in the United States Land Office at Fargo some time during the month of August, 1883." The change referred to by affiant in said letter was that of the word "refiling" contained in the clause quoted at the time it was received, to "filing." The portion of the stipulation of fact prepared by affiant and enclosed in his letter to Ball, Watson & McClay dated November, 1903 was

that contained in the 6th, 7th, 8th 9th and 10th Paragraphs to the close of the stipulation.

On or about November 11th, A. D. 1903, affiant received from the mails a letter subscribed "Ball, Watson & McClay" in the handwriting of Mr. John S. Watson, enclosing one copy of the stipulation of fact completed signed also, "Ball, Watson & McClay" in the handwriting of Mr. John S. Watson, which letter was in words as follows:

98 FARGO, NORTH DAKOTA, Nov. 10, 1903.

Subject: Company vs. Barlow.

S. E. Ellsworth, Esq., Jamestown, N. D.

DEAR SIR: We have succeeded in arranging by telegraph for the taking of Mr. Tilden's deposition at Yorkton, N. W. T., on the 20th inst. and we enclose original and copy of notice. Please sign and return same to us at once, and greatly oblige.

We have also signed and returned herewith one copy of stipulation? We have taken the liberty of making two changes, which we trust will be satisfactory to you. On the first page, we have added the words shown on the margin. This is substantially the wording of the charter, and it was an error on our part to omit it in the draft submitted to you.

On the last page we have stricken out the words, "and every part thereof," for the reason that it seems to conflict in some senses *t*with the prior language showing actual occupation of right of way 200 feet in width. Of course, your title is non*e* the less as to the whole of it, and it seems to us*e* the words mentioned ought not to be used.

Trusting these changes, which do not seem to us to be material in any way, will be satisfactory, we are,

Very respectfully yours,

BALL, WATSON & McCLAY,
Division Counsel.

Dictated.
Enclosure.

P. S.—Are we to understand that the case comes on for trial the first thing on the morning of the 16th? We have been planning to leave here on No. 3 that morning, and get up to Carrington during the course of the forenoon. Will you and the Judge go up on the same train?

B., W. & M.

This letter was typewritten except for the signature, consisted of two sheets and is hereunto attached and marked Exhibit "F". The changes referred to in this letter were the only changes, alterations, interlineations, or erasures made in the part of the stipulation of fact prepared by affiant. The clause appearing in the 7th Paragraph of the stipulation of fact, in the following words to-wit:, "At the time of such settlement there was not a railroad track laid or line of railroad in operation across said land in any place, nor had the plat or profile of the section of railroad extending across said land here-

unto referred to been filed in the United States District Land Office at Fargo" appeared in the part originally prepared by affiant, was by him transmitted to Ball, Watson & McClay at Fargo in his
99 letter of November 9th, 1903 and was returned to him in the letter of Ball, Watson & McClay dated November 10th, 1903 wholly unchanged and without any reference thereto in said letter or in any cor-espondence thereafter had prior to the trial and submission of the above entitled action.

In reply to the letter dated November 10th, 1903, affiant wrote and mailed to Ball, Watson & McClay at Fargo on November 11th, 1903 a letter in words as follows:

JAMESTOWN, N. D., November 11th, 1903.

Messrs. Ball, Watson & McClay, Fargo, N. D.

GENTLEMEN: Your letter of 10th instant enclosing stipulation in N. P. R'y Co. vs. Barlow is received. I note the addition and change you have made and consider the same unobjectionable. With reference to the date when the case can be tried, will say that it is doubtful whether it is reached until about the close of the week. There is a jury called for this term at Carrington and the jury cases on the calendar will be, of course, first disposed of. I know of several jury cases that will be tried so that the court cases cannot be reached before Friday or Saturday. I will be there on the 16th and will notify you of the number of cases that will probably be tried before it can be reached. In this way you can doubtless determine about when you should be present. It will be unnecessary that you attend on the 16th unless you wish to be present at the first call of the calendar.

S. E. ELLSWORTH.

According to affiant's best recollection and belief the foregoing letter is the last correspondence in any manner referring to the stipulation of fact in the above entitled action held between Ball, Watson & McClay or the firm of Ball, Watson Young & Hardy as counsel for the plaintiff above named and affiant at any time prior to June 16th 1908. Several letters passed during that period with reference to the time of trial of the case and the taking of certain depositions therein but without reference to the stipulation of fact executed as hereinbefore indicated. At the taking of the depositions mentioned above plaintiff was represented by T. F. McCue of Carrington. These depositions were taking as affiant believes in the early part of the year 1904 at Carrington, before C. H. Olson, a Notary Public, now the stenographer of this court. At the conclusion of these depositions it was agreed between Mr. McCue as representative of the plain-
100 tiff and this affiant as representive of the defendant, that any depositions that either party desired to take might be taken at any time upon sufficient notice and that in case no other depositions were taken either party might submit the oral testimony of such witnesses as he desired to produce at the time the case was tried. Regarding the time of trial of the case affiant had frequent conversations with Mr. McCue. He cannot, at this date, recollect conversations with any member of the firm of Ball, Watson & McClay; but

between affiant and Mr. McCue it was understood that the action presented practically the same issues as those involved in the case of Doughty vs. The Minneapolis, St. Paul, and Sault Saint Marie Railway Company which was then pending in the District Court for Foster County. The only point of difference in the two cases as recognized by counsel was the amount of construction work done prior to the time of settlement of the claimant. The case of Doughty vs. Soo Railway Company preceded the above entitled case upon the calendar of the District Court for Foster County and was tried in May 1905. As the above entitled case had not been tried at that time, and as Mr. McCue and affiant were practically agreed that the same points were involved, a suggestion was made either by affiant or Mr. McCue and assented to by the other party to the effect that the trial of this case should await the final decision of the Doughty case. Upon this understanding, as affiant believes, the trial of this case was passed at the terms of court held in Foster County during the years 1905, 1906, and 1907.

In June 1905 the case of Doughty vs. Soo Railway Company was by the District Court of Foster County decided in favor of the plaintiff. An appeal was taken by the defendant to the Supreme Court of North Dakota and in May 1906 the judgment of the District Court therein was affirmed by the Supreme Court. An appeal was thereupon taken by the defendant railway Company to the Supreme Court of the United States where the judgment of the Supreme Court of North Dakota was affirmed in February 1908.

101 In the case of Doughty vs. Soo Railway Company the map of definite location of the line of route extending across claimant's land, was not filed in the local land office until after claimant's settlement, thereon. There had been previous to claimant's settlement, however, a survey of the line of route which the defendant Railway Company claimed constituted definite location. The Supreme Court of the United States decided that such location was not sufficiently defined to constitute unmistakable evidence by the railroad company. Believing the issue involved in the above entitled action was practically the same as that presented by the Doughty case and that the point at issue being decided, the action should be brought to trial, on or about the 29th day of February, A. D. 1908, affiant wrote to the firm of Ball, Watson, Young & Hardy at Fargo, North Dakota, then representing the plaintiff in this action a letter in these words:

JAMESTOWN, N. D., Feb. 29, 1908.

Messrs. Ball, Watson, Young & Hardy, Fargo, N. D.

GENTLEMEN: The case of Northern Pacific Railway Company vs. Barlow has been upon the calendar of the Foster County District Court for several years. I wish to dispose of this case at the special term which will be held in Foster County commencing March 16th. There is little to be done in the case; only a small amount of testimony to be taken and such discussion of the law points presented as may be practicable. As the case is a court case it will not come on until late in the term; and as soon as a definite date of trial can be fixed I will notify you if you wish it.

I call your attention to this case, at this time for the reason that I thought perhaps you might have almost forgotten about it and would not think of it coming up at the special term of March 16th.

Yours very truly,

S. E. ELLSWORTH.

To this letter on or about March 3rd, 1908 he received by mail a reply in these words:

FARGO, NORTH DAKOTA, Mar. 2, 1908.

Subject: Northern Pacific vs. Barlow.

S. E. Ellsworth, Esq., Counselor at Law, Jamestown, N. D.

DEAR SIR: We have yours of February 29th. We thank you for calling our attention to the fact that this case is on the calendar for the coming term in Foster County, and that you desire to try it at that time. No one in the office at this writing has any knowledge of this case other than the fact that such a case exists. We
102 shall, doubtless, however, be able to gain sufficient familiarity with it from an examination of the papers to be able to try it. So far as we can now tell we have nothing to conflict with the trial of this case at any time you and the court may find most convenient. We would like as much notice as you can arrange to give us.

Yours very truly,
BALL, WATSON, & YOUNG & HARDY,
Division Counsel.

E. W. H.

This letter is hereunto attached and marked Exhibit "G."

The above entitled action came on for trial at a special term of the District Court for Foster County, North Dakota, held at Carrington on or about March 16th. Affiant was at Carrington on March 16th and 17th and on the latter day the case was brought to trial, T. F. McCue of Carrington, appearing for the plaintiff. The only oral testimony taken on the trial was that of George H. Estabrook of Carrington. At the conclusion of his testimony the case was submitted to the court by both plaintiff and defendant. Honorable Edward T. Burke, presiding Judge of the District Court, asked if it did not involve the point presented by the Doughty case. Affiant answered that he believed it did. Mr. McCue, as far as affiant recollects made no response but did not in any manner dissent from affiant's statement. Judge Burke, thereupon, directed affiant to prepare findings and a judgment in favor of the defendant.

Affiant left Carrington on the same day to return to his office at Jamestown, North Dakota, and was unable to prepare the findings and judgment while at Carrington. On his return to Jamestown he found at his office a letter received by mail from Ball, Watson Young & Hardy in these words:

FARGO, NORTH DAKOTA, March 16, 1908.

Subject: Northern Pacific vs. Barlow.

S. E. Ellsworth, Esq., Jamestown, N. D.

DEAR SIR: We are beginning to fear that in agreeing to your proposition to try this case at the present term in Foster County, we have taken a contract which it will be difficult for us to fulfill. It appears upon an examination of the file that this is a suit to quiet title which was begun under direction of Mr. Kerr, at that time Assistant General Counsel, and now on the Pacific Coast; that it was
103 handled in this office by Mr. Watson and that it apparently involved a number of important questions as to railroad locations and that sort of thing. Mr. Watson, no doubt, has a well formulated theory upon which he proposes to try this case and knows just what witnesses he will need in addition to the facts which seem to have been stipulated. We fear that if we should take this case up at this time, in Mr. Watson's absence, we should fail to get the record in the shape in which it ought to be tried. If you can arrange to do so, it would very much accom-odate us if the hearing of this case could be delayed until after Mr. Watson's return, which will be about the first of May. The case is a jury waived case and can be heard at any time or place with probably the same convenience that it could be heard at Carrington.

Mr. Olson told the writer the other day that he expected there would be so many jury cases tried at Carrington this term that there would be very little time for court cases. If you can see your way clear to letting this case set until Mr. Watson's return, we will then be glad to arrange to have the case heard at any time we can get hold of the judge, say in Jamestown, at such a time as might suit your convenience and the court.

Yours very truly,

BALL, WATSON, YOUNG & HARDY,
Division Counsel.

E. W. H.

Which letter is marked Exhibit "H" and hereunto attached. In reply affiant wrote a letter in these words:

JAMESTOWN, N. D., March 25, 1908.

Messrs. Ball, Watson, Young & Hardy, Fargo, N. D.

GENTLEMEN: Your letter of 16th instant with reference to the Foster County case of Northern Pacific Railway Company vs. Barlow cam- several days ago but I have been very closely occupied with other matters and I have no- found opportunity to answer until today.

Before I received your letter, I was at Carrington and on the 17th instant we took in this case the evidence of one witness, Mr. McCue appearing for Northern Pacific Railway Company. All the evidence except the testimony of this one witness had previously been taken by deposition or otherwise. The case was accordingly submitted to

the court and is now in the Judge's hands. My understanding and I think the understanding of the Judge is that the only point of difference in the case is decided in the recent case of Soo Railway Company vs. Doughty in which the opinion of the Supreme Court of the United States was handed down in February 3rd, last. I think Judge Burke also so understands it. If you wish, therefore, for further time in which to communicate with Mr. Watson or to submit authorities on any point, I think the best course would be for you to write Judge Burke about it. I will not object to a reasonable delay in the entry of judgment in order that you may be heard.

Yours very truly,

S. E. ELLSWORTH,

In reply to this letter affiant received by mail from Ball, Watson, Young & Hardy a letter in words as follows:

FARGO, NORTH DAKOTA, March 26, 1908.

104 Subject: Northern Pacific vs. Barlow.

S. E. Ellsworth, Esq., Jamestown, N. D.

DEAR SIR: Replying to yours of March 25th. We have adopted your suggestion and are today writing Judge Burke enclosing our recent corresoondence in this matter. We enclose herewith a copy of our letter of today to Judge Burke. We thank you for the accommodating attitude you have taken in this matter and assure you there will be no unnecessary delay.

Yours truly,

BALL, WATSON, YOUNG & HARDY,
Division Counsel.

E. W. H. (Enc.)

The copy referred to in this letter was in words as follows:

FARGO, NORTH DAKOTA, March 26, 1908.

Subject: Northern Pacific vs. Barlow.

Hon. E. T. Burke, Carrington, N. D.

DEAR SIR: Will you please note the enclosed copy of letter from this office to Mr. Ellsworth under date of March 16th, and his reply under date of March 25th, which explain the *sti*uation in this case as far as we understand it. We did not know that it had been arranged that Mr. McCue was to try this case, but undoubtedly Mr. Watson had arranged with him to do that.

Inasmuch as no one in the office has any knowledge of the case, we will consider ourselves under obligations to yourself and to Mr. Ellsworth as well if final disposition of this matter is delayed until Mr. Watson's return and until he may have an opportunity to decide whether he cares to submit any brief on the matter or whether he has any suggestions to offer as to any additional testimony on either side. We judge from Mr. Ellsworth's letter of March 25th that

t will not be objectionable to him to have this course taken. Kindly eturn the enclosed correspondence when you have read it. We re sending a copy of this letter to Mr. Ellsworth.

Yours truly,

——— ———.

W. H. (Enc.)

Which letter together with the copy enclosed as aforesaid is hereunto attached and marked Exhibit "I."

After the receipt of this letter affiant received no further communication by mail or otherwise from counsel for plaintiff. He did not know and was in no way advised of the return of Mr. Watson to Fargo. On or about the 20th day of May, 1908 he received from Ball, Watson, Young & Hardy a Notice of Entry of Judgment in this action in favor of the plaintiff and as soon as practicable thereafter
105 he prepared a Proposed Statement of the Case intending to appeal from the said Judgment of the District Court and incorporated in said Proposed Statement of the Case the said original stipulation of fact herein. This proposed Statement of the Case was served upon Ball, Watson, Young & Hardy as counsel for plaintiff in the latter part of June 1908. Shortly thereafter the correspondence between affiant and Mr. Watson set out in Mr. Watson's affidavit herein was commenced and contained the first suggestion at any time received by affiant that there was any mistake made inadvertantly or otherwise by Mr. Watson or by the firm of Ball, Watson & McClay, or Ball, Watson, Young & Hardy, in the said stipulation of fact.

At all times since the beginning of the above entitled action affiant has proceeded upon the theory that at the time of the settlement of Mr. Barlow upon the land involved, the map of definite location of the railway extended across the land had not been filed in the United States District Land Office at Fargo. The defence to said action was prepared upon that theory and had it been shown by the satisfactory proof that this map or profile had been filed in the United States States District Land Office at Fargo prior to July 22nd, 1883 affiant would have advised against any defense to the action. He believed at all of the times hereinbefore mentioned that the point at issue in this case was identical with that in the Doughty Case, and was induced to bring the case to trial in March 1908 solely upon that consideration. For a period of about five years he has acted upon the belief that the clause contained in the latter part of the 7th paragraph of the stipulation of fact was executed and intended to be executed in good faith by counsel for plaintiff and has based his entire action in the case largely if not entirely upon this important and material element of the stipulation of fact.

The admission by plaintiff of the matter contained in this clause of the stipulation of fact was an inducement to affiant to execute this stipulation on his part and that if said clause had not been included
106 in the stipulation of fact it would not have been executed on the part of affiant. Affiant has at all times during the continuance of said action relied and acted upon the truth of the

matter contained in this clause and if a stipulation of fact had not been made could have supplied proof upon the trial of the facts in said action.

S. E. ELLSWORTH.

Subscribed and sworn to before me this 8th day of August, A. D. 1908.

[SEAL.] F. J. SIMMONITSCH,
Notary Public, Stutsman Co., N. D.

My commission expires Jan. 3, 1911.

Thereafter, on or about the 28th day of August, A. D. 1908 the court made and entered its Order on the motion of plaintiff in words as follows:

Order.

The above entitled action came on to be heard upon the order to show cause herein dated July 25, 1908, and now the court having considered said matter, including the affidavit attached to said order to show cause and the return to the order to show cause dated August 8, 1908, together with the affidavit thereto attached, and having considered all the files, records and proceedings heretofore had in said action, and having heard the argument of counsel upon the subject, and the court being of the opinion that the stipulation of facts entered into herein was made by plaintiff's attorneys through their mistake, inadvertence, surprise and excusable neglect and that plaintiff ought to be relieved from such stipulation, Now Therefore, upon motion of Messrs. Ball, Watson, Young & Lawrence, attorneys for the plaintiff, it is.

Ordered, that the stipulation of facts made herein under date of November 8, 1903, be and the same is hereby, in all things, vacated and set aside and both parties are relieved from the same.

It is further ordered that the Findings of Fact, Conclusions of Law, Order for Judgment, and Judgment heretofore entered
107 in this action be and the same are hereby vacated and set aside.

It is further ordered that the plaintiff pay to the defendant the sum of Twenty-five dollars, which the court finds to be the reasonable sum which defendant should receive for the relief granted to the plaintiff by the granting of this order, such payment to be made to defendant's attorney within thirty days after the making of this order.

Dated August 29th, A. D. 1908.

E. T. BURKE.
Judge of District Court.

Specification of Error.

I.

The Court erred in vacating the stipulation of fact made in the above entitled action between counsel for plaintiff and counsel for defendant under date of November 8th, A. D. 1903.

II.

Te court erred in vacating and setting aside the Findings of Fact, Conclusions of Law and Order for Judgment dated May 11th, A. D. 1908.

III.

The court erred in vacating and setting aside on plaintiff's motion the judgment entered herein on May 14th A. D. 1908.

IV.

The court erred in making its order herein dated August 29th, A. D. 1908.

S. E. ELLSWORTH,
Attorney for Defendant.

108

Northern Pacific Railroad.

Engineering Department. Jamestown Northern.

Estimate Oct. 31st, 1882.

Sec.	Station	to Station.	Previous estimate.	Total No. cubic yards.	Classification.		Sub. contractor.
1	0	60	9,119	9,119	Earth @ 20¢.		S. T. Lambert & Co.
2	60	130	17,701	17,701	"	"	"
3	130	180	20,172	20,172	"	"	Walker & Bly
4	180	228	11,360	11,360	"	"	"
5	228	273	3,030	3,030	"	"	Steen & Price
6	273	284	490	490	"	"	"
6	284	295	1,310	1,310	"	"	Docksteader & Jones
6	295	318	1,720	1,720	"	"	Steen & Price
6	270	286	797	797	"	"	Walker & Bly
7	318	370	10,748	10,748	"	"	Steen & Price
8	370	429	8,761	8,761	"	"	"
9	429	466	6,550	6,550	"	"	"
10	466	467	588	588	"	"	"
10	467	510	8,869	8,869	"	"	C. B. Reynolds
10	510	528	1,610	1,610	"	"	Docksteader & Jones
11	528	559	5,770	5,770	"	"	"
11	559	580	1,106	1,106	"	"	Walker & Bly
12	580	632	8,210	8,210	"	"	"
			117,962	117,962			

Returns to be made to A. Anderson, Engineer in Chief, Brainerd, Minnesota.

Correct Estimate:

B. P. TILDEN, *Asst.*

Examined and found Correct:
JAS. B. ALEXANDER, *P. A.*

109

Northern Pacific Railroad.

Engineering Department. Jamestown Northern.

Estimate October 31st, 1882.

Sec.	Station	to Station.	Previous estimate.	Total No. cubic yards.	Classification.	Sub. contractor.
13	632	680	8,460	8,460	Earth @ 18¢.	Walker & Bly
13	680	684	910	910	" "	M. C. Price
14	684	736	10,190	10,190	" "	"
15	736	792	11,290	11,290	" "	"
16	792	845	7,248	2,748	" "	"
17	845	880	4,782	4,782	" "	"
17	880	897	3,931	3,931	" "	Marble & Dean
18	897	950	6,028	6,028	" "	"
19	950	1,002	8,744	8,744	" "	"
20	1,002	1,034	4,487	4,487	" "	Jno. Winslow
20	1,034	1,056	2,954	2,954	" "	"
21	1,056	1,108	11,356	11,356	" "	"
22	1,108	1,160	7,505	7,505	" "	"
23	1,160	1,212	7,274	7,274	" "	"
			95,159	95.159		

Returns to be made to A. Anderson, Engineer in Chief, Brainerd, Minn.

Correct Estimate.

B. P. TILDEN, *Assist.*

Examined and found Correct:
JAS. B. ALEXANDER, *P. A.*

110

Northern Pacific Railroad.

Engineering Department. Jamestown Northern.

Estimate Oct. 31st, 1882.

Sec.	Station	to Station.	Previous estimate.	Total No. cubic yards.	Classification.	Sub. contractor.
24	1,212	1,236	7,771	7,771	Earth @ 18c.	Jno. Winslow
24	1,236	1,264	3,201	3,201	" "	Walker & Bly
25	1,264	1,320	6,080	6,080	" "	"
26	1,320	1,373	12,537	12,537	" "	"
27	1,373	1,424	6,515	6,515	" "	"
28	1,424	1,477	6,642	6,642	" "	"
29	1,477	1,530	4,026	4,026	" "	"
30	1,530	1,584	4,730	4,730	" "	"
31	1,584	1,637	5,406	5,406	" "	"
32	1,637	1,689	4,829	4,829	" "	"
33	1,689	1,730	6,429	6,429	" "	"
			68,166	68,166		

Returns to be made to A. Anderson, Engineer in Chief, Brainerd, Minn.

Correct Estimate:

B. P. TILDEN, *Asst.*

Examined and found Correct:
JAS. B. ALEXANDER, *P. A.*

111

Northern Pacific Railroad.

Engineering Department, Jamestown Northern.

Estimate October 31st, 1882.

Sec.	Station	to Station.	Present estimate.	Previous estimate.	Total No. cubic yards.	Classification.	Sub. cont'r.
34	1,730	1,783	3,969	4,450	8,419	Earth @ 18¢.	Walker & Bly
35	1,783	1,836	320	3,870	4,190	"	"
36	1,836	1,890	3,238	4,160	7,398	"	"
37	1,890	1,942	405	4,000	4,405	"	"
38	1,942	1,995	148	5,800	5,948	"	"
39	1,995	2,048	1,206	5,100	6,306	"	"
40	2,048	2,112	124	7,550	7,674	"	"
41	2,112	2,164	145	9,600	9,745	"	"
42	2,164	2,217	1,350	2,730	4,080	"	"
43	2,217	2,270	0	0	0	"	"
44	2,270	2,322	1,070	0	1,070	"	"
45	2,322	2,375	700	0	700	"	"
46	2,375	2,428	1,800	0	1,800	"	"
			14,475	47,260	61,735		

Returns to be made to A. Anderson, Engineer in Chief, Brainerd, Minn.

Correct Estimate:

B. P. TILDEN, *Asst.*

Examined and found Correct:
JAS. B. ALEXANDER, *P. A.*

112

Northern Pacific Railroad.

Engineering Department, Jamestown Northern Division.

Estimate October 31st, 1882.

Sec.	Station	to Station.	Present estimate.	Previous estimate.	Total No. cubic yards.	Classification.	Sub. cont'r.
47	2,428	2,428	0	0	0	Earth @ 18¢.	Walker & Bly
48	2,480	2,533	5,000	0	5,000	"	"
49	2,533	2,586	2,800	0	2,800	"	"
50	2,586	2,640	2,200	0	2,200	"	"
51	2,640	2,692	0	0	0	"	"
52	2,692	2,745	810	0	810	"	"
53	2,745	2,797	1,550	0	1,550	"	"
54	2,797	2,850	2,000	0	2,000	"	"
55	2,850	2,905	4,800	0	4,800	"	"
56	2,902	2,955	0	0	0	"	"
57	2,955	3,007	0	0	0	"	"
58	3,007	3,060	0	0	0	"	"
59	3,060	3,112	2,200	0	2,200	"	"
			21,360	0	21,360		

Recapitulation.

	117,962	117,962	Earth @ 20¢.
35,835	210,585	246,420	" 18¢.

Returns to be made to A. Anderson, Engineer in Chief, Brainerd, Minn.

Correct Estimate:

B. P. TILDEN, *Asst.*

Examined and found Correct:
JAS. B. ALEXANDER, *P. A.*

113

Northern Pacific Railroad.

Engineering Department, Jamestown Northern.

Estimate May 31st, 1883, North Branch.

Sec.	Station	to Station.	Present estimate.	Previous estimate.	Total No. cubic yards.	Classification.	Sub. cont'r.
42	0	2,217	.....	343,167	343,167	Earth @ 20¢.	Walker & Bly
43	2,217	2,270	5,668	5,870	11,538	"	"
44	2,270	2,322	3,396	2,160	5,556	"	"
45	2,322	2,375	3,046	2,711	5,757	"	"
46	2,375	2,428	3,900	3,357	7,257	"	"
47	2,428	2,480	3,411	850	4,261	"	"
48	2,480	2,533	381	5,724	6,105	"	"
49	2,533	2,586	609	5,291	5,900	"	"
50	2,586	2,640	3,201	2,619	5,820	"	"
51	2,640	2,692	5,230	.....	5,230	"	"
52	2,692	2,745	4,848	810	5,658	"	"
53	2,745	2,797	4,982	1,550	6,532	"	"
54	2,797	2,850	1,732	2,000	3,732	"	"
55	2,850	2,902	376	4,964	5,340	"	"
56	2,902	2,955	3,150	250	3,400	"	"
57	2,955	3,007	6,050	1,450	7,500	"	"
58	3,007	3,060	6,980	1,020	8,000	"	"
59	3,060	3,112	7,015	5,985	13,000	"	"
			63,975	389,778	453,753		

Returns to be made to A. Anderson, Engineer in Chief, Brainerd, Minn.

Correct Estimate:

B. P. TILDEN,
Asst. Engineer.

Examined and found Correct:

114

Northern Pacific Railroad.

Engineering Department, Jamestown Northern.

Estimate May 31st, 1883, North Branch.

Sec.	Station	to Station.	Present estimate.	Previous estimate.	Total No. cubic yards.	Classification.	Sub. cont'r.
69	3,560	3,612	500	850	1,350	Earth @ 20¢.	Walker & Bly
70	3,612	3,664	2,300	2,200	4,500	"	"
71	3,664	3,720	8,600	400	9,000	"	"
72	3,720	3,772	1,200	....	1,200	"	"
73	3,772	3,825	4,000	....	4,000	"	"
77	3,985	4,040	4,200	....	4,200	"	"
78	4,040	4,092	2,000	....	2,000	"	"
			22,800	3,450	26,250		

Recapitulation.

86,775	130,782	217,557	@ 20¢.
	262,446	262,446	18¢.

Means final estimate."

Correct Estimate:

B. P. TILDEN.
Asst. Engineer.

115 File No. 1876.

STATE OF NORTH DAKOTA,
In the Supreme Court:

NORTHERN PACIFIC RAILWAY CO., Plaintiff and Respondent,
vs.
HARRIET A. BARLOW, Defendant and Appellant.

Appeal from the District Court of Foster County.

This action coming on to be heard at the October A. D. 1909 term of this Court, at the Supreme Court room, in the City of Bismarck, State of North Dakota:

Present: D. E. Morgan, Chief Justice; C. J. Fisk, B. F. Spalding, and S. E. Ellsworth, Associate Justices, and the appeal herein having been argued by John Knauf for the Appellant and submitted by Ball, Watson, Young & Lawrence for Respondent and the Court having advised thereon, it is now here considered, ordered and adjudged, that the order of the said District Court within and for said Foster County appealed from herein, be and the same is hereby reversed.

And it is further ordered, that this cause be and it is hereby remanded to the District Court for further proceedings according to law, and the order of this Court.

And it is further considered and adjudged, that Appellant have and recover of the Respondent costs and disbursements on this appeal expended to be taxed and allowed in the District Court.

Dated April 15, 1910.

By the Court,

D. E. MORGAN,
Chief Justice.

R. D. HOSKINS, *Clerk.*

116 STATE OF NORTH DAKOTA,
In the Supreme Court, ss:

I, R. D. Hoskins, Clerk of the Supreme Court, within and for the State of North Dakota, do hereby certify that the above and foregoing is a full, true, correct and complete copy of the order of the Supreme Court of the State of North Dakota, in the above entitled action, and the same is transmitted to the District Court in and for the County of Foster, State of North Dakota, as the Remittitur herein.

In witness whereof, I have hereunto set my hand and affixed the seal of said court, this 6th day of May, A. D. 1910.

[STATE SEAL.] R. D. HOSKINS, *Clerk.*

Fees, Clerk of Supreme Court, taxed and allowed at $13.80.

117 In the Supreme Court, State of North Dakota, October, 1909, Term.

NORTHERN PACIFIC RAILWAY COMPANY, Respondent,
vs.
HARRIET A. BARLOW, Appellant.

1. In November, 1903, at the instance and request of plaintiff's counsel a stipulation was entered into embracing the facts relevant to all the issues except one. Such stipulation was entered into in good faith without fraud or any attempt to deceive plaintiff's counsel and after a most careful consideration. Defendant's counsel in good faith relied upon such stipulation for nearly six years. In March, 1908, the cause was tried and submitted upon such stipulated facts and certain testimony relevant to the issue not covered by the stipulation. In May following the trial court made its findings of fact and conclusions of law favorable to plaintiff and ordered judgment accordingly which was entered pursuant thereto on May 14, 1908. Defendant's counsel thereafter took steps to settle a statement of the case preparatory to appealing to this court and on July 25, 1905, on application of plaintiff's counsel, an order was made requiring defendant to show cause why an order should not be made vacating and setting aside such findings of fact, conclusions of law, order for judgment and judgment, and also why plaintiff should not be relieved from a portion of such stipulation of facts or why such stipulation of facts should not be modified by eliminating such portion or why the parties should not be relieved in toto from such stipulation. Upon the return of such order to show cause and after due hearing the order complained of was made vacating the findings, conclusions, order for judgment and judgment.

Held, 1. That such order, in so far as it vacates the find-
118 ings of fact and relieved the parties from such stipulation, is appealable under subdivision 4, Section 7225 R. C. 1905, upon the ground that it "involves the merits of the action or some part thereof."

2. Whether such order, in effect, grants a new trial and therefore is appealable under the provisions of Subdivision 3 of said section, no- determined.

3. While trial courts may, in the exercise of a sound judicial discretion and in furtherance of justice, relieve parties from stipulations which they have entered into in the course of judicial proceedings, and while this court, sitting as a court of review, will not interfere with nor control the exercise of such discretion thus vested in trial courts, except in cases of a clear abuse of such discretion, the facts presented disclose a manifest abuse of such discretion in granting the order appealed from.

4. The making of such stipulation should be encouraged rather than discouraged by the courts and enforced unless good cause is shown to the contrary and applications to be relieved from stipulations should be seasonably made. Parties will not be relieved from

such stipulations in the absence of a clear showing that the fact or facts stipulated are untrue, and then only when the application for such relief is seasonably made and good cause is shown for the granting of such relief. The facts in the case at bar do not bring the application within these requirements.

(Syllabus by the Court.)

Appeal from District Court, Foster County, Edward T. Burke, J.

This action was commenced in September, 1902, for the purpose of quieting title to a certain strip of land used as a right of way by plaintiff Railway Company. The complaint is in the statutory form. In November of said year issue was joined by answer in which defendant claims title to the land in controversy as the widow, sole heir and devisee of one Frederick G. Barlow, deceased.

The other facts necessary to a proper understanding of the case
embraced in the following stipulation of Facts which was
119 entered into by counsel on November 8, 1903:

"Stipulation of Fact.

The following facts are hereby stipulated to be true:

1st. That at all times since the 17th day of September, A. D. 1881, the Jamestown and Northern Railroad Company was, and now is, a railroad corporation, organized under and existing by virtue of the laws of the Territory of Dakota, now State of North Dakota and chartered to build a line of railroad from Jamestown, N. D., in a northwesterly direction through Stutsman Foster, Eddy and Benson Counties to the west end of Devils Lake. After its organization as aforesaid, the said Jamestown and Northern Railroad Company authorized and directed the survey of a line of route for a railroad from a point near the City of Jamestown, in a northwesterly direction through the counties of Stutsman and Foster, in said Territory of Dakota; said survey was commenced on the 1st day of September, 1881, and completed on the 30th day of October, 1881, and in its course passed across the land described in the complaint herein. A map or plat representing such survey was prepared, and on the 5th day of October, 1882, said Company by resolution of its board of directors adopted said line of route so surveyed and as represented on said map as the definite location of a section of its line of route between the points mentioned.

2nd. Thereafter said Jamestown & Northern Railroad Company transmitted to the Secretary of the Interior a copy of its articles of incorporation, certified by the Secretary of Dakota Territory; also a certificate of its organization, under the laws of the said Territory of Dakota, made by its secretary, and an affidavit of its president, designating the officers of said corporation, all of which papers were received in the Department of the Interior on January 26th, 1883.

3rd. The land in controversy in this action is situated in the land district of the United States Land Office at Fargo, and has been so

situated at all times. On June 7th, 1893, the records of the
120 United States Land Office at Fargo, North Dakota, were destroyed by fire. At this time the records of the Land Office do not contain any profile or map of plaintiff's railroad over the land in question. Tract Book No. 15, of said Land Office, is a copy of the Original Tract Book which was destroyed by fire on June 7th, 1893, which said copy now contained in the Land Office at Fargo, was furnished to said office by the General Land Office of the United States, and was made up from the records there kept. Upon such tract book No. 15, and in the plat therein contained relating to Township 147, range 66, there is traced across said plat in red ink marking, a line extending through said township, which line running upon said course, bears small cross marks such as is generally used in map making, to indicate a railroad, and which line also has connected with it in red ink the words "Jamestown Northern," with red ink arrow pointing north parallel with said line. In the same tract book No. 15, the other plats of townships both north and south of the one last referred to, are found similar lines with similar markings, and it all put together shows a continuous line of something apparently indicating a railroad and which is called "Jamestown Northern." In the operation of United States Land Offices, all original documents such as homestead entries and homestead pre-emption proofs, are regularly forwarded by the local land office to the general land office at Washington, where the same are kept as original records.

A profile and map were made containing the following endorsements and no other namely: "Part of map of definite location of Jamestown and Northern Railroad from Junction with Northern Pacific Railroad to north line of Foster County, Dakota Territory. Brainerd, December 30th, 1882, P. H."

STATE OF MINNESOTA,
County of Crow Wing, ss:

A. Anderson, of Brainerd, in said County and State, being duly sworn says that he is the engineer in chief of the Jamestown and Northern Railroad Company, that the survey of the line of
121 route of said road from its junction with the Northern Pacific Railroad, to the north line of Foster County, and Territory of Dakota, was made under his direction as engineer in chief of the company, and under its authority, commencing the 1st day of September, 1881, and ending on the 30th day of October, 1881, that such survey is accurately represented on the accompanying map.

A. ANDERSON,
Engineer in Chief.

Subscribed and sworn to before me this 28th day of December, 1882.

RICH RELF,
Notary Public

I, George Adams, do hereby certify that I am the president of the Jamestown and Northern Railroad Company; that A. Anderson, of Brainerd, who subscribed the foregoing affidavit, is the chief engineer of the company: that the survey of the line of route of the company's road as accurately represented on this map, was adopted by the company by resolution of its board of directors, on the 5th day of October, 1882, as the definite location of the road, from its junction with the Northern Pacific Railroad, to the north line of Foster County, in Dakota Territory, and that the map has been prepared to be filed for the approval of the Secretary of the Interior in order that the Company may obtain the benefit of the act of Congress, approved March 3rd, 1875, entitled "An Act granting to railroads the right of way through the public lands of the United States."

GEO. H. ADAMS,
President of the Jamestown & Northern Railroad Company.

Attest:
SIDNEY STARBUCK.
[SEAL.] *Secretary.*

Z. B. S., Department of the Interior, June 26th, 1883. J. K. McC. Approved subject to any existing rights of the Northern Pacific Railroad Company.

122

DEPARTMENT OF THE INTERIOR.
GENERAL LAND OFFICE.
WASHINGTON, D. C., April 29th, 1897.

I, Binger Hermann, Commissioner of the General Land Office, do hereby certify that the annexed tracing is a true and literal exemplification of a part of a map of definite location of the Jamestown and Northern Railroad, approved by the Secretary of the Interior, on June 26th, 1883, and now on file in this office.

In Testimony Whereof, I have hereunto subscribed my name and caused the seal of this office to be affixed at the City of Washington, on the day and year first above written.

[SEAL.] BINGER HERMANN,
Commissioner of General Land Office.

That the map of definite location above referred to, and approved by the Secretary of the Interior on June 28, 1883, was filed in the United States Land Office at Fargo, sometime during the month of August 1883.

4th. By deed of conveyance properly executed and delivered, the said Jamestown and Northern Railroad Company duly conveyed to the plaintiff herein, on April 21st, 1898, the line of railroad of the said Jamestown and Northern Railroad Company, including the road as constructed over the land described in the complaint herein, and including all of the right, title and interest of the said Jamestown & Northern Railroad Company, in and to the right of way occupied by it over the land described in the complaint, and that

thereafter said deed of conveyance was duly recorded in the office of the Secretary of the State of North Dakota, and that the plaintiff herein has succeeded to all the rights of the said Jamestown & Northern Railroad Company, if any it had, in and to the right of way occupied by the defendant over the land mentioned in the complaint; that the Southwest Quarter (S. W. 1/4) of section six (6) Township one hundred and forty seven (147), range sixty six (66), Foster County, Dakota Territory, was public land of the United
123 States; said tract was surveyed by the government sometime prior to October 2nd, 1884, and on said last mentioned date the plat of survey thereof and of the township in which said quarter section is situated, was recorded in the United States Land Office at Fargo, North Dakota.

5th. Plaintiff has not, nor did its predecessor in interest, at any time institute proceedings or resort to any process whatever under the state or Federal Laws, to condemn a right of way across said land, or to divest defendant or her predecessors in interest of her or their title, or any predecessor claim that she or they might have to said land, other than the filing of the map of definite location, as hereinbefore set forth. Plaintiff and its predecessor in interest, the Jamestown & Northern Railroad Company, have taken for use as a right of way upon said land, a strip 200 feet wide, being 100 feet on each side of the centre line of its said railroad, and extending across said land, and which strip includes — acres; defendant and her predecessors in interest have not at any time consented to the taking or use of said land by plaintiff, and has not received any compensation for said taking or for the injury and damage if any, inflicted thereby.

6th. On and prior to the 22nd day of July, A. D. 1883, the land in controversy, towit: Southwest Quarter (S. W. 1/4) of section six (6) in township one hundred and forty seven (147) north, of range sixty six (66), west of the fifth principal merid-an, was unsurveyed public land of the United States, agricultural in character, not reserved from sale and was subject to settlement under the pre-emption law of the United States then in force. On said 22nd day of July, A. D. 1883, Frederick G. Barlow was a citizen of the United States, over the age of twenty one years, had never had the benefit of the pre-*e*xption laws of the United States, was not the proprietor of 320 acres of land in any state or territory, had not quit or abandoned his own land or his residence thereon to reside on the said land above described and was, in all respects, legally qualified to initiate
124 proceedings under the pre-emption laws of the United States to obtain title to 160 acres of land agricultural in character from the public lands of the United States.

7th. On said 22nd day of July, A. D. 1883, intending to make entry of the said land hereinbefore described when the same was surveyed, and to acquire title to the same by virtue of compliance with the pre-emption laws of the United States, said Frederick G. Barlow settled upon said land and took up his residence thereon. At the time of such settlement there was not a railroad track laid or line of railroad in operation across said land at any place nor

had the plat or profile of the section of railroad extending across said land hereinbefore referred to been filed in the United States District Land Office at Fargo.

8th. From the date of his said settlement, said Frederick G. Barlow continuously resided on said land and made the same his home and cultivated and improved the same until a survey thereof was made; and on the 8th day of October, A. D. 1884, and within 90 days after the receipt at said district land office of the approved plat of the township embracing his said pre-emption settlement, said Frederick G. Barlow filed in said District Land Office at Fargo, a written statement describing the said land so settled upon by him and declaring his intention to claim the same in accordance with the pre-emption laws of the United States, alleging settlement upon said tract as of the 22nd day of July, A. D. 1883, as aforesaid.

9th. Thereafter, having continued his residence upon and improvement of said land, according to law, on or about the 8th day of July, A. D. 1885, after due notice of his intention so to do, said Frederick G. Barlow made final proof of his entry, settlement, residence upon and improvement of said land as aforesaid and the payment required by law and submitted the same to the register and receiver of said district land office at Fargo, and on said 6th day of July, A. D. 1885, received from said district land office a final certificate of entry of said land. Thereafter, pursuant to the said settlement, entry and final proof of said Frederick G. Barlow upon
125 said land, as aforesaid, there was issued and delivered to him by the Government of the United States, a patent, dated November 7th, A. D. 1883, granting and conveying to him in absolute fee simple the said land by the description hereinbefore given, without limit reservation or deduction of any kind or to any extent whatever.

10th. Said Frederick G. Barlow continued to hold the said land under the grant and title thereto acquired by him as hereinbefore set forth, until the time of his death in or about the year 1901; at which time he was with the defendant herein, occupying said land as a homestead under the law of this state. The defendant is the widow and sole heir and devisee of said Frederick G. Barlow and is still occupying said land as her homestead and is invested with all estate and title thereto acquired and held by said Frederick G. Barlow at the time of his decease.

Dated Nov. 8, A. D. 1903.

BALL, WATSON & McCLAY,
Attorneys for Plaintiff.
S. E. ELLSWORTH,
Attorney for Defendant."

The cause was not brought to trial until March, 1908, at which time the same was tried upon the above stipulation and certain testimony relative to the date when the railway company constructed its grade and roadbed over the land in question. On May 11, 1908, the trial court made findings of fact and conclusions of law favorable

to plaintiff and ordered judgment accordingly and judgment was rendered pursuant thereto on May 14, 1908.

Thereafter, and on July 25, 1908, an order was made requiring defendant to show cause why an order should not be made vacating and setting aside such findings of fact, conclusions of law, order for judgment and judgment, and also why plaintiff should not be relieved from the last clause of the 7th paragraph of the stipulation of facts; and why said stipulation of facts should not be modified by excluding and striking therefrom said clause; or at the option
126 of the defendant why all of said stipulation should not be vacated and set aside and both parties relieved therefrom. Such order to show cause was issued upon the affidavit of J. S. Watson, one of plaintiff's attorneys, and on the return thereof defendant's attorney submitted his affidavit in opposition to the granting of the relief prayed for. These affidavits are quite lengthy and need not be set out at length. The affidavit of plaintiff's counsel is to the effect that such stipulation was entered into, containing the clause aforesaid, through mistake, inadvertance and excusable negligence and that the clause thus incorporated in the stipulation is not according to the facts. The affidavit of defendant's counsel sets out, in detail, the correspondence between the respective counsel had prior to entering into such stipulation and tends to refute the contention that such stipulation was entered into through mistake or inadvertence on the part of plaintiff's counsel. Such affidavit also contains the following recitals:

"At all times since the beginning of the above entitled action affiant has proceeded upon the theory that at the time of the settlement of Mr. Barlow upon the land involved, the map of definite location of the Railway extending across the land had not been filed in the United States District Land Office at Fargo. The defense to said action was prepared upon that theory and had it been shown by any satisfactory proof that this map or profile had been filed in the United States District Land Office at Fargo, prior to July 22nd, 1883, affiant would have advised against any defense to the action. He believed at all of the times hereinbefore mentioned that the point at issue in this case was identical with that in the Doughty case, and was induced to bring the case to trial in March, 1908, solely upon that consideration. For a period of about five years he has acted upon the belief that the clause contained in the latter part of the 7th paragraph of the stipulation of fact was executed and intended to be executed in good faith by counsel for plaintiff and has based his entire action in the case largely, if not entirely upon this
127 important and material element of the stipulation of fact.

The admission by plaintiff of the matter contained in this clause of the stipulation of fact was an inducement to affiant to execute this stipulation on his part and that if said clause had not been included in the stipulation of fact it would not have been executed on the part of affiant. Affiant has at all times during the continuance of said action relied and acted upon the truth of the matter contained in this clause and if a stipulation of fact had not

been made could have supplied proof upon the trial of the facts in said clause contained."

Thereafter, and on August 29, 1908, the trial judge made an order vacating and setting aside the findings of fact, and also vacating and setting aside in toto the stipulation of facts aforesaid and relieving both parties from the same. From such order this appeal is prosecuted. Appellant complains of that portion of the order merely which vacates the stipulation of facts and relieves the parties from the force and effect thereof.

John Knauf, for Appellant.
Ball, Watson, Young & Lawrence, for Respondent.

FISK, *J.* (after stating the facts as above):

It is strenuously insisted by respondent's counsel that the order complained of is not appealable. As to that portion of the order vacating the judgment, such contention is no doubt sound. The judgment was adverse to defendant, hence she was not aggrieved by the order vacating the same, but the order goes much farther than a mere vacation of the judgment; it sets aside the findings of fact and, in effect, grants a new trial. Not only this, but it goes farther and nullifies and destroys a solemn stipulation entered into between the parties covering most of the facts relevant to the issues involved and relegates the parties to their original positions in the action at the time the answer was served nearly six years prior thereto. If permitted to stand such order necessitates, not only a re-trial
128 of the case from the beginning, but deprives defendant of the benefit of such stipulation, compelling her to entail the expense and trouble incident to procuring evidence covering the issues disposed of by the stipulation. We deem it reasonably clear that such order "involves the merits of the action or some part thereof" within the meaning of Subdivision 4, section 7225 R. C. 1905, and is therefore appealable. It would, indeed, be strange if the rule was otherwise as it would result in depriving defendant of the right to have such order *tr*-viewed. Important and substantial legal rights of defendant are destroyed by such order and no redress is afforded her unless she may appeal therefrom. Manifestly no right of review is afforded her under the provisions of section 7226 R. C. That section reads: "Upon an appeal from a judgment the supreme court may review any intermediate order or determination of the court below, which involves the merits and necessarily affects the judgment." Such order may or may not affect the ultimate judgment to be rendered, and under the plain wording of said section the order is not reviewable on an appeal from the final judgment unless it necessarily affects such judgment. The case of Bolton vs. Donavan, 9 N. D. 575, is in point upon the last proposition and also sustains our views above expressed to the effect that the order complained of is appealable. Subdivision 4 of section 7225, supra, is there construed and it is held that the phrase "involves the merits" must be interpreted so as to embrace orders which pass upon the substantial legal rights of the suitor, whether such rights do or do

not relate directly to the cause of action or subject matter in controversy and authorities are therein cited from the states of Wisconsin, South Dakota and Minnesota in support of the rule of construction thus announced. In addition to the authorities cited in Bolton v. Donavan see the recent case of Plano Manufacturing Company v. Kaufert, 86 Minn., 13, to the same effect and which cites with approval the two early Minnesota cases criticised by respondent's counsel in their brief.

The authorities relied upon by respondent's counsel in
129 support of their contention that the order, in so far as it vacates the stipulation of facts, is merely an interlocutory order and not appealable, are not in point under a statute like ours and it would serve no useful purpose to review them here.

In support of our view that the order is appealable see 20 Ency. of Pl. and Pr. 669 and cases cited under notes 10 and 11. It will be noticed that the cases therein cited are all from the states of New York, Minnesota and Wisconsin, each of which have a statute the same as Subdivision 4, Section 7225, supra.

Our conclusion upon this feature of the appeal is that the order in so far as it vacates and sets aside the findings of fact and relieves the plaintiff of the force and effect of the stipulation, is appealable upon the ground that it involves the merits within the meaning of Subdivision 4, section 7225 aforesaid. In view of this conclusion we need not determine whether it is also reviewable under the last clause of Subdivision 3 of said section upon the ground that it, in effect, grants a new trial.

This brings us to the merits. That trial courts may, in the exercise of a sound judicial discretion for good cause shown and in furtherance of justice, relieve parties from stipulations which they have entered into in the course of judicial proceedings, is elementary. It is equally well settled that an appellate court, sitting as a court of review, will not interfere with, nor control the exercise of such discretion thus vested in the trial court, except in cases of a clear abuse of such discretion. Authorities need not be cited upon propositions so well established. A number of authorities are cited and relied on by respondent's counsel in support of their contention that the stipulation was properly vacated. We have examined such authorities and find nothing therein contained which furnish much light or assistance under the facts here presented. They merely announce in a general way the principle that trial courts possess the power to relieve and will, in the exercise of a sound discretion,
relieve a party from the effects of stipulations of facts, not
130 true, if, as stated in Richardson v. Musser, 54 Cal. 196, "the application is made in proper time;" or, as stated in Keens v. Robertson, 46 Neb. 837, "when their enforcement would result in serious injury to one of the parties and the other party would not be prejudiced by their being set aside."

We take is, however, to be reasonably well settled that the making of such stipulations should be encouraged by the courts rather than discouraged, and enforced by them unless good cause is shown to the contrary. Lewis v. Summer, 13 Metc. (Mass.) 269; City of

Lincoln v. St. Ry Co. (Neb.) 93 N. W. 766. See also 20 Ency. Pl. & Pr. 668 and cases cited. The cases of City of Lincoln v. St. Ry. Co., supra, is particularly in point under a state of facts quite analogous to those in the case at bar. There, a stipulation had been entered into embracing 38 paragraphs covering most of the issues. At the trial plaintiff asked to be relieved from a portion of such stipulation upon the ground that the facts stipulated were not true and counsel claimed to have been misled in agreeing to and signing the same. In sustaining the ruling of the trial court in refusing to relieve plaintiff therefrom the court, among other things, said: "It would also seem that the application came too late to be entertained by the court. The plaintiff had made its case and rested. It has put in evidence all of the stipulation, except that portion of it which defendants were then attempting to introduce, and it would have been unjust at that stage of the proceedings to deny the defendants the benefit of these paragraphs. Yet counsel insist that the court, in the exercise of its discretion, ought to have sustained the objection and granted their request. We cannot assent to this proposition. Paragraph 15 fixed the time when the bonds and mortgage in question were delivered to the New York Security & Trust Company, and stipulated that they were sold to bona fide purchasers for value, without knowledge or notice of any of the matters mentioned in the stipulation, except such constructed notice, if any, as was
131 imparted by the corporate records of the Street Railway Company, and of the City of Lincoln and the laws of this state. Paragraph 16 contain- practically the same statements as to the bonds and mortgage executed and delivered to the New York Guaranty & Indemnity Company. * * * If the court had sustained the objection and granted the request, the result would have been a mistrial. It would have rendered it necessary to retry the whole case, and to require this to be done would have been an abuse of discretion. Stipulations and agreements like the one in question should be encouraged and sustained by the court." Citing numerous authorities, including Van Horn v. Ry. Co., 169 Ia. 239, 28 N. W. 547, from which case they quote with approval the following language: "Where a party to a suit has entered into a written stipulation admitting that a town ordinance was valid and in full effect at the time of an accident, he cannot be relieved from it simply on the ground that he was ignorant when he entered into it, and that the ordinance was invalid for want of publication." Ryan v. Mayor, 154 N. Y. 331, 48 N. E. 512, is also quoted from with approval.

Parties should not be relieved from stipulations except for good cause shown, and the application should be seasonably made. Delay in asking for relief may defeat the application. 20 Enc. Pl. & Pr. 662, 666 and cases cited.

Applying these fundamental and well established rules to the facts in the case at bar forces us to the conclusion that the making of the order was a gross abuse of discretion. The application to be relieved from the stipulation was made nearly five years after the stipulation was entered into. Such stipulation was entered into at the solicitation of respondent's counsel, in the utmost good faith,

without the least attempt to mislead or taking undue advantage of respondent's counsel by counsel for defendant and after mature deliberation by both counsel. For nearly five years defendant's counsel relied in good faith upon such stipulation as stating the true facts and the cause was tried, submitted and decided without any intimation whatsoever that such stipulation did not recite the true
132 facts. Not only this, but the showing on which such order was granted no where makes it appear that the facts thus stipulated are untrue. On the contrary it is stated in the affidavit of plaintiff's counsel that there is no evidence available to show what the true facts are.

Opposed to this is the affidavit of defendant's counsel positively stating, in effect, that the facts thus stipulated are true and that it was definiely understood and agreed that the sole question left open for determination in the trial was the date on which the Railway Company constructed its grade or roadbed over said land and the only evidence offered in the trial, aside from the stipulation, related to such issue. Counsel for plaintiff do not contend that if relieved from such stipulation they will be able, upon another trial, to establish the fact to be other or different than as stipulated. They merely contend, in effect, that they are entitled to have such fact rest on a mere presumption or inference but there is no reasonable probability that the fact thus stipulated can be shown to be untrue.

In view of the showing made we are entirely clear that the granting of the order complained of, in so far as it relieved plaintiff from the stipulation of facts, was an abuse of discretion.

For these reasons the order is reversed.

All concur.

C. J. FISK
D. E. MORGAN
JOHN CARMODY
W. C. CRAWFORD
B. F. SPALDING.

Ellsworth, J. being disqualified did not participate, Hon. W. C. Crawford, Judge of the Tenth Judicial Dist. Sitting in his place by request.

133 File No. 1876.

STATE OF NORTH DAKOTA,
In the Supreme Court:

NORTHERN PACIFIC RAILWAY CO., Plaintiff and Respondent,
vs.
HARRIET A. BARLOW, Defendant and Appellant.

Appeal from the District Court of Foster County.

I, R. D. Hoskins, Clerk of the Supreme Court, within and for the State of North Dakota, do hereby certify that the above and fore-

going is a full, true, correct and complete copy of the opinion of the Supreme Court of the State of North Dakota, in the above entitled action, as the same now remains of file in said Court.

In Witness Whereof, I have hereunto set my hand and affixed the Seal of said Court, this 6th day of May, A. D. 1910.

[SEAL.] R. D. HOSKINS, *Clerk.*

134 STATE OF NORTH DAKOTA,
County of Foster, ss:

In District Court, Fifth Judicial District.

NORTHERN PACIFIC RAILWAY COMPANY, Plaintiff,
vs.
HARRIET A. BARLOW, Defendant

Order for Judgment on Remittitur.

The defendant having this day moved this court for an order in accordance with the decision, opinion and judgment of the Supreme Court of North Dakota, in the above entitled action, on appeal of the same, entered on the 15th day of April, A. D. 1910; and due notice of said motion having been given by said defendant to the plaintiff herein; and now on return day of said notice the court having examined the records of the action and the opinion of the Supreme Court of North Dakota, upon appeal of the same duly filed and entered herein as aforesaid:

Now Therefore, on the judgment roll and record of the above entitled action including the statement of the case settled and allowed herein, on the opinion and judgment of the Supreme Court of North Dakota entered herein as aforesaid, on the remittitur of said Supreme Court transmitted to this court and filed herein, and on motion of John Knauf and S. E. Ellsworth, attorneys for said defendant,

It Is Ordered that said order made and entered herein on the 29th day of August, A. D. 1908, vacating and setting aside the findings of fact, conclusions of law, order for judgment and judgment entered in the above entitled action and a stipulation of fact made and entered into by counsel for the respective parties under date of November 8th, A. D. 1903, be reversed, vacated and set aside.

135 And It Is Further Ordered, that the clerk of this court enter judgment in favor of Harriet A. Barlow, the defendant above named, and against the Northern Pacific Railway, said plaintiff, for her costs of said appeal in the sum of $193.30 to be taxed according to law and when so taxed to be inserted in said judgment.

Dated January 31, A. D. 1911.

By the Court.

J. A. COFFEY, *Judge.*

136 STATE OF NORTH DAKOTA,
County of Foster, ss:

In District Court, Fifth Judicial District.

NORTHERN PACIFIC RAILWAY COMPANY, Plaintiff,
vs.
HARRIET A. BARLOW, Defendant

Judgment.

The defendant having on the 31st day of January, A. D. 1911 moved this court for an order in accordance with the decision, opinion and judgment of the Supreme Court of North Dakota, in the above entitled action, on appeal of the same, entered on the 15th day of April, A. D. 1910; and due notice of said motion having been given by said defendant to the plaintiff herein; and on the return day of said notice the court having examined the record of the action and the opinion of the Supreme Court of North Dakota upon appeal of the same duly filed and entered herein as aforesaid, and being fully advised in the premises; and having duly made and entered its order for judgment upon remittitur herein;

Now Therefore, on said order for judgment made by the court as aforesaid and duly filed and entered herein and upon motion of John Knauf and S. E. Ellsworth, attorneys for the defendant above named,

It Is Ordered and Adjudged that a certain order made and entered herein on the 29th day of August, A. D. 1908, vacating and setting aside the findings of fact, conclusions of law, order for judgment and judgment entered in the above entitled action, and a stipulation of fact made and entered into by counsel for the respective parties under date of November 8th, A. D. 1908, be and the same is, hereby reversed, vacated and set aside:

137 And It Is Further Ordered, that Harriet A. Barlow, the defendant above named, have and recover of Northern Pacific Railway Company, said plaintiff, her costs of appeal in the above entitled action in the sum of $193.30, as stipulated by counsel and thereupon taxed according to law.

Witness, the Hon. J. A. Coffey, Judge of the District Court of the Fifth Judicial District of the State of North Dakota, and the seal of said court this 2nd day of February, A. D. 1911.

[SEAL.]

E. L. BEATY,
Clerk of the District Court.

138 STATE OF NORTH DAKOTA,
County of Foster, ss:

In District Court, Fifth Judicial District.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, Plaintiff and Respondent,
vs.
HARRIET A. BARLOW, Defendant and Appellant

Notice of Appeal.

To the plaintiff and respondent above named; to Messrs. Ball, Watson, Young & Lawrence, its attorneys; and to E. L. Beaty, Clerk of the District Court for Foster County, North Dakota:

You will take notice, that the defendant and appellant above named appeals to the Supreme Court of the State of North Dakota from a judgment and decree of said district court originally entered herein on the 14th day of May, A. D. 1908 in favor of said plaintiff and respondent quieting its title to certain real property situated in Foster County, North Dakota, against the claims of said defendant and appellant, together with the sum of $37.00, the costs of said action; which judgment and decree were thereafter by order of said court dated August 29th, A. D. 1908, together with the findings of fact and conclusions of law supporting the same, vacated and set aside and so continued, void and of no effect until February 2nd, 1911 when by entry of a further order of said court vacating and setting aside its order last above mentioned said judgment and decree were reinstated and restored, and are now in force and effect as of February 2nd, A. D. 1911, the date of said order; and from the whole of said judgment as reinstated and restored as aforesaid.

Dated December 16th, A. D. 1911.

S. E. ELLSWORTH,
Attorney for Defendant and Appellant, Jamestown, N. D.

139 STATE OF NORTH DAKOTA,
County of Foster, ss:

In District Court, Fifth Judicial District.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, Plaintiff & Respondent,
vs.
HARRIET A. BARLOW, Defendant & Appellant.

Undertaking on Appeal.

Wher-as, on the 14th day of May, A. D. 1908, in the district court aforesaid, the above named plaintiff and respondent recovered a judgment and decree in its favor quieting its title to certain real estate

situated in Foster County, North Dakota, against the claims of the above named defendant and appellant, together with the sum of $37.00 as costs and disbursements of said action; which judgment and decree was thereafter by order of said court dated August 29th, A. D. 1908, together with the findings of fact and conclusions of law supporting the same, vacated and set aside; and which was thereafter by a further order of said court dated February 2nd, A. D. 1911, vacating and setting aside said last mentioned order, re-instated and restored and is now in force and effect as of date February 2nd, A. D. 1911;

And, the above named defendant and appellant feeling aggrieved by said judgment in favor of the plaintiff and respondent as aforesaid intends to appeal therefrom to the Supreme Court of North Dakota;

Now therefore, we, the undersigned, do hereby undertake and agree that said defendant and appellant will pay all costs and damages which may be awarded against her on said appeal or on a dismissal thereof, not exceeding the sum of Two Hundred and Fifty (250) Dollars.

HARRIET A. BARLOW.
By S. E. ELLSWORTH,
Her Attorney.
UNITED STATES FIDELITY AND GUARANTY COMPANY.
of Baltimore, Maryland.
[SEAL.] By ALFRED STEEL,
Its Attorney in Fact.

140 STATE OF NORTH DAKOTA,
County of Stutsman, ss:

On the 16th day of December, A. D. 1911, before me, a notary public in and for the county and state aforesaid personally appeared Alfred Steele known to me to be the person who is described in and whose name is subscribed to the within and foregoing instrument as attorney in fact of the United States Fidelity and Guaranty Company of Baltimore, Maryland, and acknowledged to me that he subscribed the name of the United States Fidelity and Guaranty Company thereto as principal and his own name as attorney in fact.

[SEAL.] S. E. ELLSWORTH,
Notary Public, Stutsman County, N. Dak.

My commission expires Apr. 21, 1914.

Service of the foregoing Notice of appeal and undertaking on appeal is refused for the reason the same is not made within the time provided by law for taking an appeal and for the further reason more than one year has elapsed since date of order of Supreme Court upon former appeal herein and filing of Order therein with Clk.

of Dist. Court for Foster County, N. D., and it's too late to now take any additional proceedings herein.

BALL, WATSON, YOUNG & LAWRENCE,
Att's for P'l'ff.

Dec. 16, 1911.

141 STATE OF NORTH DAKOTA,
County of Foster, ss:

In District Court, Fifth Judicial District.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, Plaintiff & Respondent,
vs.
HARRIET A. BARLOW, Defendant & Appellant,

Specification for Review.

Harriet A. Barlow, the defendant and appellant above named, desires a review of the entire case in the Supreme Court.

Dated January 11th, A. D. 1912.

S. E. ELLSWORTH,
Attorney for Defendant.

142 STATE OF NORTH DAKOTA,
County of Foster:

In District Court, Fifth Judicial District.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, Plaintiff & Respondent,
vs.
HARRIET A. BARLOW, Defendant & Appellant,

Order Allowing Amendment to Statement of the Case.

On the express stipulation of counsel for the respective parties to the above entitled action duly presented to me and filed herein, and it appearing to the satisfaction of the court that in the interests of justice and for the purpose of obtaining a review upon appeal of the entire case as tried before the district court that the said agreement of counsel should be approved and confirmed by an order of this court,

Therefore It Is Ordered, that the statement of the case in the above entitled action prepared by counsel for defendant and on the 7th day of November, A. D. 1908, duly settled and allowed by Edward T. Burke, then the judge of this court, be amended by adding, annexing and attaching thereto a specification for review in the following words, towit: "Harriet A. Barlow, the defendant and appellant above named, desires a review of the entire case in the Supreme Court;" and that such specification so attached shall, for

all purposes connected with or relating to an appeal from the judgment entered in said action, be made a part of said statement of the case as fully as though the same had been thereto attached at the time said statement of the case was originally settled, certified and allowed.

Dated January 30, A. D. 1912.

By the Court.

J. A. COFFEY,
Judge of the District Court.

143 STATE OF NORTH DAKOTA,
County of Foster:

In District Court, Fifth Judicial District.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, Plaintiff & Respondent,
vs.
HARRIET A. BARLOW, Defendant & Appellant.

Stipulation of Counsel.

It is hereby stipulated and agreed by the parties to the above entitled action by their respective counsel, that there may be attached to and made a part of the statement of the case prepared and served by counsel for the defendant above named and settled, allowed and duly certified by the judge of the district court before whom said action was heard and determined on the 7th day of November, A. D. 1908, a specification for review of said action in the following words, to-wit:

"Specification for Review.

Harriet A. Barlow, the defendant and appellant above named, desires a review of the entire case in the Supreme Court."

It is further stipulated and agreed that said statement of the case with said specification attached, so far as the same is applicable to such appeal, may be used by said defendant upon appeal from the judgment and decree entered in the above entitled action with the same force and effect as though prepared, settled and allowed for the purpose of appeal from said judgment and decree; and that subject to the right of the plaintiff above named to move for the dismissal of the appeal from said judgment and decree upon the grounds that it was not taken within time, and upon the ground that further proceedings in the case were not had within a year, and upon any other grounds which the plaintiff desires to urge as ground for such dismissal, the Supreme Court may, upon
144 said statement of the case with such specification attached, try the case anew with the same force and effect as though at the time of the preparation and settlement of said statement of the case the same had contained a demand on the part of the defendant

for a review and trial de novo of the entire case; it being hereby expressly understood and agreed that in the event plaintiff's motion for the dismissal of said appeal on the grounds aforesaid is overruled, plaintiff expressly waives its right to raise any objection on the point that at the time of the settlement and preparation of said statement of the case it did not embody such specification, and consents that the Supreme Court may, under the conditions aforesaid, review the entire case upon the evidence and proceedings contained in said statement of the case and try the same anew.

It is further stipulated and agreed that subject to the approval of the said Supreme Court, the printed abstract prepared by said defendant for use upon a former appeal from an order dated August 29th, A. D. 1908, in said action, may in whole or in such part as the same may be applicable thereto, be utilized and considered on said appeal from the judgment and decree entered in said action with the same effect as though prepared for use on such appeal; the said plaintiff hereby waiving and intending to waive any objection to such use of said printed abstract.

It is further stipulated and agreed, however, that upon the appeal of defendant from said judgment and decree in the above entitled action, nothing contained in this stipulation shall preclude, prejudice or in any manner affect the right of the plaintiff to move for a dismissal of the appeal taken by said defendant as aforesaid on the ground that the same was not taken within time and upon the ground that further proceedings in the case were not had within a year after the filing in the district court of Foster County, *a*of
the remittitur upon the former appeal herein, and upon
145 any other grounds that the plaintiff may see fit to urge in support of its motion for the dismissal of said appeal.

Dated, December 16th, A. D. 1911.

BALL, WATSON, YOUNG & LAWRENCE,
Attorneys for Plaintiff.

S. E. ELLSWORTH,
Attorney for Defendant.

146 On the 13th day of June, 1913, the said appeal was duly argued in the said Supreme Court of the State of North Dakota by S. E. Ellsworth, Esq., counsel for the appellant and by Messrs. Watson & Young, counsel for the respondent.

Whereupon the merits of said appeal having been duly argued, the same was submitted to the court and by the court taken under advisement.

147 On the 9th day of September, A. D. 1913 there was filed in this Court the following Order:

File No. 2436.

STATE OF NORTH DAKOTA, *ss:*

In the Supreme Court.

NORTHERN PACIFIC RY. CO., Plaintiff and Respondent,
vs.
HARRIET A. BARLOW, Defendant and Appellant.

Appeal from the District Court of Foster County.

This action coming on to be heard at the April A. D. 1913 term of this Court, at the Supreme Court room, in the City of Bismarck, State of North Dakota;

Present: Burleigh F. Spalding, Chief Justice; Charles J. Fisk, Evan B. Goss and Andrew A. Bruce, Associate Justices, and the appeal herein having been argued by S. E. Ellsworth for the Appellant and by Watson & Young for Respondent and the Court having advised thereon, it is now here considered, ordered and adjudged that the judgment of the said District Court within and for said Foster County appealed from herein, be and the same is hereby affirmed.

And it is Further Ordered, That this cause be and it is hereby remanded to the District Court for further proceedings according to law, and to the order of this court.

And it is further Considered and Adjudged, that Respondent have and recover of the Appellant costs and disbursements on this appeal expended, to be taxed and allowed in the District Court.

Dated September 9th, 1913.

By the Court:

B. F. SPALDING,
Chief Justice.

[Seal of the Supreme Court, State of North Dakota.]

Attest:
R. D. HOSKINS, *Clerk.*

148 On the 3d day of October, A. D. 1913, there was filed in this Court the following petition for re-hearing:

In Supreme Court, State of North Dakota, April Term, 1913.

NORTHERN PACIFIC RY. CO., Plaintiff and Respondent,
vs.
HARRIET A. BARLOW, Defendant and Appellant.

Petition for Rehearing.

This appeal being before the Supreme Court for trial de novo, the defendant and appellant above named in this her petition for rehear-

ing respectfully shows to the court, that in its decision of said appeal as announced in its opinion filed on the 9th day of September, A. D. 1913, the court has inadvertently and by mistake, passed upon certain questions of fact in a manner contrary to undisputed or agreed proofs and not in accord with the weight of evidence. That the court in its decision has overlooked and failed to give due consideration to controlling authorities, precedents, statutes and principles of law decisive of the case; and that the decision of the court as announced, is in conflict with decisions of this court and controlling precedents, statutes and authorities decisive of the points of law presented by said appeal.

Questions of Fact.

In support of her said petition for rehearing, the defendant and appellant first respectfully calls the attention of the court to rulings and holdings of this court upon questions of fact contained in said opinion and hereinafter quoted, which are either wholly unsupported by the evidence offered by either party upon the trial of said cause or are in conflict with the undisputed or agreed facts or against the weight of the testimony produced before the trial court, to-wit:

(1) "How long prior to the approval of the plat and pro-
149 file the same were on file in the office of the Secretary of the Interior does not appear, nor does it appear how the same came into the possession of the Secretary,—whether they were filed in the local land office and transmitted therefrom or filed directly by the railway company. There is a stipulation, however, which, under the decision in Barlow vs. Ry. Co., 20 N. D. 197, we must recognize (though we seriously question its truth) to the effect that etc." Opinion P. 1, lines 27-33; P. 2, line 1.

(2) "It seems quite clear to us from the evidence that although Barlow entered upon the land upon the 22nd day of July, A. D. 1883, the grading of the road across said land was completed prior to May 31st, 1883; that is to say, nearly two months before his settlement." Opinion, P. 2, Lines 11-15.

(3) "It is also quite clear that the rails were laid upon the grade between August 10th and 15th, 1883, and that trains were operated on said road and across said land soon after. Under stipulation we are constrained to hold (in spite of our belief in the matter), that up to the time of the said entry no plat had been filed in the local land office etc." Opinion, P. 2, Lines 15-20.

(4) "In the case at bar, the railroad company had not merely practically constructed the road at the time of the entry, but the plat had been approved at Washington." Opinion, P. 5, Lines 15-18.

(5) "It would be absurd to hold that one who enters upon land and sees upon it a railroad grade which is only 18 days from physical completion, and, as we have a right to believe, but a link in miles of road stretching across the same prairrie, was not aware of this prior railroad occupation." (Opinion, P. 5, Lines 31-33; P. 6, lines 1-3.)

(6) "Added to this is the fact that the entryman himself never

asserted any claim against the road and that a station was put in at or near the point and named after him, in the neighborhood of which he lived for some time. It is his widow devisee, merely, who is found to protest." (Opinion, page 6, lines 3-7.)

(7) "No one would contend that on account of the failure to file the plat in the local land office, if failure there was, he was induced to settle upon land which otherwise he would not have occu-
150 pied, or that the location of the road did not increase the value of his land, nor is there any evidence to the effect." (Opinion, page 6, lines 7-12.)

(8) "The fact, is that much as we may clamor for damages when a railroad right of way is sought to be condemned across our lands when railroads are plentiful and near at hand, the proximity of a railroad in a new country is a thing which the intending settler most desires." (Opinion, page 6, lines 15-19.)

Points of Law.

And your petitioner further respectfully shows and specifies the following holdings and rulings of this court as set out in its said opinion upon questions of law, which are in conflict with controlling statutes, precedents, decisions and authorities decisive of such points, which have been overlooked or inadvertently disregarded by this court in its consideration of the appeal.

(*a*) "It is for us, therefore, to determine whether the surveying of a road across a quarter section of government land, the construction on said land of a grade ready for the rails and the approval of the map and profile of the road and survey by the Secretary of the Interior prior to the entry of the settler, gives to the Railway Company title to such right of way which is superior to that of the entryman. We are quite satisfied that it does." (Opinion, page 2, lines 20-27.)

(*b*) "We are quite satisfied from these decisions that what the Act of Congress aimed at was a fixity of location; that is to say, a location which the railway company could not change at will in case it later found a route which was more advantageous to it." (Opinion, page 5, lines 5-9.)

(*c*) "It (the case at bar) is, however, stronger than the Jamestown case on account of the fact that the plat had been approved at Washington, and that the railway company was powerless to then change the location." (Opinion, page 5, lines 22-25.)

(*d*) "There can be no doubt, indeed, that the route was fixed both on account of the physical construction and the difficulty of a subsequent removal, and on account of the fact that its offer of a permanent location had been accepted by the Federal authorities." (Opinion, page 5, lines 25-29.)

(*e*) "The entryman in this case can have no more ground for complaint than could the entryman in the case of Stalker vs.
151 Oregon Shortline, supra." (Opinion, page 5, lines 29-31.)

(d) "According to the case of Stalker vs. Oregon Short Line, he must be imputed with constructive notice not merely of the

construction of the grade, but of the proceedings at Washington." (Opinion, page 6, lines 12-15.)

(*g*) "The question is, after all, one for the Supreme Court of the United States, and not for us to ultimately decide, and all that we can do is to seek to interpret the prior decisions of that tribunal. This we have attempted to do, and our conclusions are that the judgment of the district court should be affirmed and it is so ordered." (Opinion, page 6, lines 20-24.)

Citation of Proofs and Precedents upon Questions of Fact.

I.

Preliminary to a citation of proofs in support of the questions of fact relied upon by appellant, it becomes necessary to call the attention of the court to a proposition generally affecting the entire appeal which in view of the fact that the case is before this court for trial anew and a re-determination of both issues of law and fact, becomes of serious import. It will be conceded that if this appeal was from a case properly triable to a jury and was before this court simply for purposes of review, the judgment entered must be reversed for the reason that its only support is findings of fact that are not only at variance with undisputed proofs, but which in specific points are hopelessly contradictory of each other. For instance, in finding III, appears a clause to the effect "That the map of definite location (of the section of railroad extending across the land) approved by the Secretary of the Interior on June 26th, 1883, was filed in the United States Land Office at Fargo some time during the month of August, 1883." (Abstract, page 53*a*, Folio 209*a*).

In finding VII, appears this clause, "At the time of such settlement (the settlement of Barlow on July 22, 1883) there was not a railroad track or line of railroad in operation across said land at any place, nor had the plat nor profile of the section of railroad extending across said land been filed in the United States District Land Office at Fargo." (Abstract, page 56*a*, Folio 221*a*-222*a*.)

152 In direct contradiction of these findings, in finding XI, appears the words "I further find that the profile and map referred to in the third finding were in fact filed in the local United States Land Office at Fargo, North Dakota, being the land office for the district in which said land in controversy in this action was situated, at some time prior to June 26, 1883, and was by the officers of said Land Office transmitted to the Commissioner of the General Land Office at Washington, D. C." (Abstract, page 58*a*, Folio 230*a*-231*a*.)

This court inadvertently overlooking or disregarding this unprecedented state of the record has announced in its opinion, that the judgment entered by the district court is affirmed. As stated above, we deem unquestionable that upon a mere review of the case, the judgment must necessarily have been reversed. Can it be said that a judgment which could not be sustained by an appellate court upon

a review of the proceedings upon the trial, can, upon a re-trial of the case under our peculiar statute regulating appeals in equity cases, be affirmed in toto, without modification of the findings on which it is based; or without an attempt even to make these findings consistent with each other? If this can be done the question arises, to what feature of the judgment (which unquestionably includes the findings and conclusions on which it is based) is the affirmance directed? Does this court affirm the judgment upon the point of fact that the map of definite location was filed in the local land office prior to June 26, 1883 as announced by Finding VII; or on August 11th, 1883, as held by Finding III? Does this court affirmatively hold that the plat of definite location was filed in the Fargo Land Office before June 26, 1883, as found by the trial court without any support whatever in the proofs; or after the settlement of Barlow on July 22, 1883, as also found by the trial court upon the absolutely undisputed authority of a stipulation of fact? Clearly facts that stand like these in absolute contradiction of each other cannot both be affirmatively held; but by affirmance of the judgment in all its parts, this court adopts as its own, not only the judgment of the district court but also its findings upon points that are absolutely irreconcilable one with the other.

A further reason why, the record on appeal should not be left in a state so uncertain and unsatisfactory upon a vital point, is expressed in the words of the Opinion, "The question is, after all, one
153 for the Supreme Court of the United States, and not for us to ultimately decide." (Opinion, page 6, lines 19-21.) Upon an appeal to the Supreme Court of the United States, the judgment of this court will be simply reviewed; there will be no re-trial of the issues. Hence the importance to whichever party shall ultimatly bring the case before the Federal tribunal, of having the findings of this court in support of its judgment, specifically set forth. As was suggested upon the argument of this case, the findings of the trial court are probably the most remarkable that ever came before the Supreme Court of this State. Certainly a record so thoroughly inconsistent and contradictory should not, at least without some attempt to rectify its obvious defects, be permitted to come before the Supreme Court of the United States. Whatever may be the view of this court as to the ultimate result of this appeal, a new judgment should be entered based upon consistent findings, clearly setting forth the holding upon questions of fact of this court, and that judgment made the judgment of this court instead of the one which it has now in terms, adopted.

II.

Passing now to the consideration of specific questions of fact assumed by the court in its opinion as true, appellant first requests consideration of the holding quoted in specification 1, in the words "Nor does it appear how (the plat of definite location) came into the possession of the Secretary,—whether they were filed in the Local Land Office and transmitted therefrom or filed directly by the Railway Company."

It is very evident that the date of filing of the plat of definite location in the Local Land Office at Fargo, North Dakota, is a vital point in this case; in fact, the pivot about which the entire controversy turns. That it was not filed before the settlement of Mr. Barlow upon the land on July 22, 1883, is a fact wholly undisputed by any proof which appears upon the record of this case. No fact in the case is so well settled or so little open to question or dispute. Other facts mentioned in the opening sentences of the Opinion of this court, such as "That a survey of the strip in question was made in September and October, 1881, was adopted by action of the Board of Directors of the Jamestown & Northern Railway Company, on October 5, 1882, and approved by the Secretary of the Interior on June 26, 1883" are "undisputed" upon the record only because
154 they appear in the first and second paragraphs of the stipulation of fact entered into between counsel for the parties to this action, on November 8, 1903. That these facts should be accepted by the court without question, while the further facts appearing in paragraph III of the same stipulation, to the effect that "The map of definite location * * * was filed in the United States Land Office at Fargo some time during the month of August, 1883" is disregarded; and the clause in paragraph VII, "At the time of (Barlow's) settlement * * * the plat or profile of the section of railroad extending across said land hereinbefore referred to, had not been filed in the United States District Land Office at Fargo," is slighted off by the court with the remark at once place, "We seriously question its truth" and in another "We are constrained to hold its substance in spite of our belief in the matter," are features of this case which appellant most respectfully urges, could only have found way into the decision of this court through entire oversight of portions of the record, and mistake or misapprehension of others.

It is not the intention of counsel in this petition for rehearing, to again plunge into the controversy which in time past has raged about the 8th paragraph of the stipulation of facts made among the first proceedings in this case, except to call to the attention of this court that it has judicially found that this clause of the stipulation "Was entered into at the solicitation of respondent's counsel, in the utmost good faith, without the least attempt to mislead, or taking undue advantage of respondent's counsel by counsel for defendant, and after mature deliberation by both counsel. For nearly five years defendant's counsel relied in good faith upon such stipulation as stating the true facts, and the cause was tried, submitted, and decided without any intimation whatsoever that such stipulation did not recite the true facts. Not only this, but the showing on which such order was granted nowhere makes it appear that the facts thus stipulated are untrue. On the contrary it is stated in the affidavit of plaintiff's counsel that there is no evidence available to show what the true facts are. Opposed to this is the affidavit of defendant's counsel, positively stating, in effect, that the facts thus stipulated are true, and that it was definitely understood and agreed that the sole question left open for determination on the trial was the date on which the Railway Company constructed its grade or roadbed over said land, and the

only evidence offered in the trial, aside from the stipulation related to such issue. Counsel for plaintiff do not contend that, if relieved from such stipulation, they will be able, upon another trial, to establish the fact to be other or different than as stipulated. They merely contend, in fact, that they are entitled to have such fact rest on a mere presumption or inference, but there is no reasonable probability that the fact thus stipulated can be shown to be untrue." Northern Pacific Railway Company vs. Barlow, 20 N. D. 197, at page 210; 126 N. W. 233.

That in the face of a judicial finding such as this, counsel for respondent, should, in the argument of this case, have still urged
155 upon the court, that the clause in question was untrue in fact and had been entered by mistake and inadvertance on his part, is the most extraordinary circumstance in the small galaxy of remarkable happenings that have attended this case from its inception. Counsel for appellant has at all times stood upon the fact that respondent's plat was not on file at the time of Barlow's settlement, not as one, the concession of which has been gained through some technical or questionable advantage over counsel for the other party, but because it is true. As shown by the judicial findings above quoted, the stipulation of fact was made advisedly by defendant's counsel after mature deliberation and those facts therein agreed to in his favor, have at all times been used by him to respondent's advantage and are now in this opinion, held to be true by this court. The sworn declaration of appellant's counsel to the effect that had he not in the trial of this action, relied upon the admission of the clause in the 8th paragraph of the stipulation of fact, he would have established the facts there agreed to by competent proof, appears in this record. (Abstract page 119, folio 474); and in support of this statement it is elsewhere shown that he had ready at hand the testimony of the Register of the United States Land Office at Fargo, to the effect that the plat was filed there August 6, 1883, (Abstract page 90A, folio 359*a*). Opposed to this showing there is not upon this record a scintilla of evidence to in any manner discredit or contravene the facts solemnly agreed to in the 8th paragraph of the stipulation of fact. It is therefore, respectfully submitted that this court has in its opinion by oversight and inadvertance in its "aside" remarks upon the effect to be given the 8th paragraph of the stipulation of fact, placed appellant at a disadvantage and in a situation of undeserved hardship.

This hardship is not softened to the slightest degree by the fact that the court grudgingly and unwillingly holds ("Under constraint" as stated in the opinion) that "up to the time of Barlow's entry no plat had been filed in the local land office;" for in its conclusions it deprives appellant of the entire value to be derived from such holding, by construing the law of the case in exactly the same manner as would have followed had it held the stipulated fact to be untrue in accord with the pitiful clamors of respondent.

There should be no uncertainty whatever upon the point referred to in specification 1, as to how the plat came into the pos-
156 session of the Secretary of the Interior,—whether it was filed in the local Land Office and transmitted therefrom or file-

directly by the Railroad Company." As already shown, both the stipulation of fact and the finding of the district court, is to the effect that the plat was "filed in the United States Land Office at Fargo, some time during the month of August, 1883." (Abstract page 14, Folio 55; page 53*a*, folio 209*a*).

That this was an original filing of the plat and not a refiling is conclusively demonstrated by the correspondence between counsel at the time the stipulation was made. Respondent's counsel writes on February 4, 1903. "Our record shows that the map of definite location was filed with the Secretary of the Interior, though we do not have the date upon which it was so filed. It was sent by the Secretary of the Interior, to the Commissioner of the General Land Office, January 27th, 1883, and was approved June 26, 1883. It was filed at Fargo some time in August, 1883." (Abstract page 94*a*, folio 374*a*-375*a*.)

On November 9, 1903, appellant's counsel in speaking of the stipulation of fact, writes "The only change I have made in your part is in the 3rd paragraph where I have made it appear that the profile or plat was filed in the district land office at Fargo, in August, 1883, instead of refiled. I believe the fact to be in this as in the Jones case, that the profile was transmitted to the Secretary of the Interior before filing in the district land office and was so filed only after its approval." (Abstract 101*a*-102*a*, Folio 402-404.)

With this letter before him, the chief counsel for respondent on November 10, 1903, signed and returned the stipulation from which the word "refiled" had been stricken out and the word "filed" put in its place. It was then deliberately recognized and solemnly agreed that an original filing and not a refiling occurred in August, 1883. (Abstract 103-104, folio 409-415.) These references should conclusively dispose of any uncertainty on the point that the plat was originally filed directly with the Secretary of the Interior, and was not filed in the local land Office and afterward transmitted to him.

It seems, about this period, to have been the practice of the Northern Pacific Railway Company, to file its plats of definite location directly with the Secretary of the Interior. This had been done in the case of Jones vs. Jamestown Ry. Co., as referred to in the letter of appellant's counsel, and as appears from the opinion of this court in that case. The only finding in harmony with the agreed facts and the circumstances so far shown attending the filing of this plat, point out unerringly that it was filed directly with the Secretary of the Interior, approved by him and afterward transmitted to the
157 local land office, which it reached in August, 1883.

III.

Specifications 2, 3, 4 and 5 deal principally with the amount of railroad work upon the land in controversy, at the time of Mr. Barlow's settlement, with the time when the rails were laid upon the roadbed, and with the degree of practical construction attained prior to July 22, 1883. It is conceded that there is certain evidence consisting largely of contractor's estimates and engineer's reports which tends to show that a considerable amount of work was done upon this

roadbed in May, 1883. These witnesses differed among themselves as to the time the grade was completed, some putting it as late as July 5th or 10th (Winslow, Abstract page 5, folio 229). There is also some rather indefinite evidence that the rails were laid in August 1883. It is respectfully submitted however, that upon the entire evidence, this court is not warranted in holding as it does in specification 2, "That the grading of the road across said land was completed prior to May 31, 1883;" or as in specification 3, "It is quite clear that the rails were laid upon the grade between August 10th and 15th, 1883; or as in specification 4, "That the railroad company had practically constructed the road at the time of the (Barlow's) entry;" or as in specification 5, "That at the time of Barlow's entry the railroad grade upon the land "was only 18 days from physical completion" and "but a link in miles of road stretching across the same prairie." The railroad evidence upon these points is very far even from being clear or convincing; and is most certainly not conclusive. Directly opposed to the testimony of the railroad witnesses on all these points, *it* that of a number of farmers who were living in the vicinity of the land at the time of Mr. Barlow's settlement, all of whom agree upon the point that the grade was not completed before July 22, 1883, while some testify that no work at all had been done upon it. (Greitel, Estabrook, Buchannan, Abs. PP. 66-88, Folios 262-351.) Mr. Estabrook, of whose entire credibility there is not the slightest question, testified in the most positive manner that no work of excavation or grading was done prior to August, 1883. (Abstract pp. 69-70 folios 274-8.) The testimony of all of these witnesses was disinterested and should have very great weight. We therefore submit that the findings that the grade was completely constructed in May, 1883, that the rails were laid in August 1883, and that the
158 road was practically constructed at the time of Mr. Barlow's entry, are directly opposed to the weight of evidence.

The finding that at the time of Mr. Barlow's entry, there was upon the land, a railroad grade "only 18 days from physical completion" which was, "but a link in miles of road stretching across the same prairie," is, we submit in all fairness, without any support whatever. A railroad is in a state of "physical completion" only when the rails are laid, the levels completed and everything is in a condition for the operation of trains upon it. Even assuming the rails were "laid" in August, 1883, it does not by any means follow that there was then a railroad in a state of physical completion upon which trains might be regularly operated; but Winslow the contractor, respondent's principal witness testifies that the "iron was laid at Barlow some time in October" and it seems to be conceded on all hands that the railroad was not operated until after November 1st, 1883. To assume therefore, that on July 22, 1883, the section of the railroad across Mr. Barlow's land was "only 18 days from physical completion," and "but a link in miles of road stretching across the same prairie" is wholly unwarranted by any evidence in the record.

IV.

The finding contained in specification 6, "That the entryman himself never asserted any claim against the road;" and that "It is his

widow devisee merely who is found to protest," is also unsupported by any showing whatever. So far as appears from the record in this case Mr. Barlow throughout his lifetime, asserted consistently and continuously his claim to the entire quarter section of land without reservation, as conveyed to him by his patent. During all the time after Mr. Barlow's settlement, the railroad company were advised by his occupation of the land and compliance with the Homestead Law and later by the record of his patent, of his claim to the entire quarter section. He was in possession of the land and in order to maintain his claim, it was not necessary that he should give other notice to the Railroad Company or commence an action at law. The railroad company did not see fit to commence this action to quiet title in itself until after Mr. Barlow's death. If Mr. Barlow had not asserted the title and the Railroad Company had not known that he was claiming it, it would not have been necessary for it to bring this action. The reasonable presumption therefore is, not only that Mr. Barlow
159 during his lifetime asserted his claim to the land, but that the Railroad Company knew of it; and the merit of his claim is certainly not diminished in the slightest degree by the fact that his aged widow is not attempting to maintain against the attack of the Railroad Company, the claim which accrued to him during his lifetime.

V.

The finding in specification 7, that "No one would contend that on account of the failure to file the plat in the Local Land Office, if failure there was, he (Barlow) was induced to settle upon the land which otherwise he would not have occupied," is, we submit, directly contrary to the showing of the record and to any reasonable inference from the facts. It is now and here contended most strenuously, that if Mr. Barlow, at the time of his settlement, had been advised that the Railroad Company was claiming a right of way in area more than 12 acres across this land, he would have settled elsewhere. At that time, this great section of country was unsurveyed and everywhere open to settlement. If Mr. Barlow, therefore, had been advised by the filing of a plat of definite location in the local Land Office at Fargo, that the line of route extended very near his intended place of settlement, there is every reason to believe that he would have selected lands in such location, that while they had all the value of near proximity to the railroad, — were not reduced in value to a considerable degree by a taking for right of way. It is not necessary to offer evidence to show that the placing of the road upon this quarter section of land and the taking of 12 acres out of 160 for railroad purposes, would not increase the value of the land. The reasonable presumption is that it would not; and if the railroad company had complied with the requirements of the Act of Congress, and given to Mr. Barlow the notice of appropriation to which he was entitled, the probability is he would have located elsewhere. These are the reasonable inferences upon this point, which we respectfully submit should be given weight by the court in its determination of the facts.

VI.

With reference to the facts held in specification 8, we can only reiterate what is said above with reference to "The proximity of a railroad in a new country being the thing which the intending
160 settler most desires." In a new country where public lands are plentiful, the intending settler desires to have a railroad in proximity to, but not upon his land. It is readily perceived that the taking of a part of the land for railroad purposes partially or entirely off-sets the value of proximity. The "clamor for damages when a railroad right of way is sought to be condemned across our lands, when railroads are plentiful;" proceeds from the cause that at that time settlers are prevented from going elsewhere by the fact that lands are then not plentiful. When lands are plentiful and may be had in almost any location for the taking, there is no occasion for clamor.

Precedents, Decisions, and Authorities on Questions of Law.

The primary purpose in our somewhat extended discussion of the relation of the findings set out in the opinion of this court to the proofs contained in the record, is to call the attention of the court to the true facts in order that the principles of law may be applied without bias or misapprehension. A change in its holdings upon the fact, is not, however, by any means necessary to a change in the holdings of this court upon the principles of law governing the case.

As the findings of the court now stand, it is an unquestionable fact that the settlement of Mr. Barlow on the land in controversy was made on July 22, 1883, and followed up by proof of residence, cultivation and other requirements necessary to compliance with the Homestead Law; and that a patent was issued to Mr. Barlow conveying to him title to the land without reservation of railroad right of way or of any interest or estate whatever. It is a further admitted fact, however reluctant this court may be to hold it, that at the time of Mr. Barlow's settlement on July 22, 1883, "There was not a railroad track laid or line of railroad in operation across said land at any place, nor had the plat or profile of the section of railroad extending across said land, been filed in the United States District Land Office at Fargo."

The holdings upon the points of law of this court in its opinion, will not be separately considered as hereinbefore specified. We desire to call attention to points contained in several of the specifications, the combined effect of which is, to lead this court in its
161 final determination of the appeal, to inadvertently disregard the plain intent of the Act of Congress of March 3, 1875, and to announce holdings in conflict with precedents, and decisions of the Supreme Court of the United States construing that law. These rulings are found in specification (*a*) in the words "It is for us to determine whether the survey of a road across a quarter section of government land, the construction on said land of a grade ready for the rails and the approval of the map and profile of the road by the Secretary of the Interior prior to the entry of the settler, gives to the

Railway Company title to the land which is superior to that of the entryman. We are quite satisfied that it does." In specification (*b*) in the words "We are quite satisfied from these decisions that what the Act of Congress aimed at was fixity of location." In specification (*c*) in the words "The entryman in this case can have no more ground for complaint than could the entryman in the case of Stalker vs. Oregon Short Line."

These holdings indicate that the court in its construction of stated facts had misconstrued the holdings of the Supreme Court of the United States in the Jones, Doughty and Stalker cases and that the decision of this court is in conflict with the holdings of the Federal Supreme Court in those cases.

By an express holding of this court, it is determined that "The necessary inference of the language used by Mr. Justice McKenna in the Jamestown & Northern case is, it seems to us, that actual construction is the only sufficient act other than compliance with Section 4, to constitute a definite location."

Doughty vs. Minneapolis, St. P. & SS. M. Co. 15 N. D. 290; 107 N. W. 971.

A careful reading of the opinion of the Supreme Court of the United States in the Jones case, satisfies one of the correctness of this holding: It is apparent from such reading that while as this court has held "That what the Act of Congress aimed at was fixity of location" such fixity was but one element of the requirement of the Act. Section 4 of the Act is clearly designed to provide for not only fixity of location upon the land, but also notice to an intending settler. In the Jones case, it was held that both of these elements are subserved by actual construction and operation of the railroad prior to the settlement of the settler upon the land. Only such acts as combine these two elements are within the purpose of the
162 Act of Congress.

In the Stalker case, prior to the entry of the settler upon the land the plats in duplicate had been filed in the local land office, one of which was retained and the other transmitted to the Secretary of the Interior. While no annotation of this filing was made upon the plats in the local land office, the duplicate copy on file there operated as constructive notice to an intending settler that a proceeding for the approval of the plat by the Secretary of the Interior had been initiated. It must be conceded that no such notice to prospective settlers was given in this case. Consequently the holding of the court that "The entryman in this case can have no more ground for complaint than could the entryman in the case of Stalker vs. Oregon Short Line," is not sustained by the opinion of the Supreme Court of the United States in the Stalker case or by any other authority. The clear intent of Section 4, is that the filing of the plat in the Local Land Office shall operate as notice until approval by the Secretary of the Interior; and that after such approval an annotation upon the office plats shall be made to serve the same purpose. At another place in its opinion the court holds as shown in specification (*d*) that to the appellant in this case must be imputed, "con-

structive notice not merely of the construction of the grade, but of the proceedings at Washington." It is respectfully submitted that constructive notice of the proceeding at Washington cannot be imputed to Mr. Barlow, for the reason that he had no notice either actual or constructive of its initiation. Upon what theory then can it be held that he is bound by an approval by the Secretary of the Interior of the selection of a line of route — which he had no notice whatever.

In reviewing the decision of this court, it would seem that it is placed upon the theory that respondent has acquired title by compliance with section 4, of the Act of March 3, 1875. Unless respondent is held to have complied with the requirements of Section 4, it certainly has not acquired title for the reason that it has confessedly not complied with the alternative method provided by the construction of the law in the Jones case. It can not be claimed that partial compliance with both methods may be so joined together as to operate as full compliance with either. Or to be more specific it cannot be claimed that the notice required by Section 4, is given by
163 partial construction of the railroad. Therefore, it would seem that the only consistent theory upon which the decisions of this court can be upheld, is compliance by respondent, with section 4.

That the plat or profile was approved by the Secretary of the Interior before Barlow's settlement without notice to him of the fact that a proceeding had been initiated for that purpose, gives no greater strength to the claim of respondent under Section 4, than does the partial construction of its railroad under the alternative method, and neither can operate to convey title in the absence of other essential elements. Therefore, under the rule established by the Supreme Court of the United States in the Jones case, we submit that respondent has failed to make good its title to right of way because; (1) It has failed in an essential particular in its compliance with section 4 of the Act of March 3, 1875, in that it did not file its plat of definite location in the local land office where it might serve as notice of its appropriation to an intending settler. And failing to do this it has not "done everything which it was required to do" as said of the railway company in the Stalker case. (2) It has not completed "actual construction" of its railroad which this court has declared to be "The only sufficient act other than compliance with Section 4, to constitute a definite location."

That the filing of the plat of definite location in the Local Land Office is an act necessary to compliance with Section 4, is indicated by the regulations of the Commissioner of the General Land Office made pursuant to the Act of March 3, 1875. These rules are almost contemporaneous with the passage of the Act, and contain this requirement. "Upon the location of any section of the line of route of its road not exceeding 20 miles in length, the company must file with the Register of the Land District in which such section of the road or the greater portion thereof is located, a map, or maps for the approval of the Secretary of the Interior, showing the termini of such portion of the road, its length and its route over the public

lands according to the public surveys * * * It will be observed that the requirements of the law regarding the filing of the proper papers and maps are conditions precedent to the obtainment of the right to construct a railroad over the public lands."

In a later circular issued January 13, 1888, the Commissioner of the General Land Office reiterates the same instructions with the following among other things in addition:—"The right of a railroad company does not attach until its map or maps of definite location has been approved by the Secretary of the Interior and a copy transmitted to the District Land Office within which the line of road is situated. * * * If a settler has a valid claim to land existing at the date of the approval of the map of definite location, his right is superior and he is entitled to such reasonable measure of damages for right of way as may be determined."

Commissioner's Circular 2 Dec. Int. Dept. 423.

164 In this case it is presupposed that the approval of the Secretary of the Interior is preceded by the filing of the map in the District Land Office in conformity to the instructions of the Commissioner. An approval by the Secretary of the Interior of which an intending settler had no notice, is therefore, not within contemplation.

If the decision of this court, however, should be said to rest upon the theory that respondent has complied with the requirements of act of March 3, 1875, by actual construction of its railroad, the ruling of this court is in conflict with the holdings of the Federal Supreme Court in the Jones, Doughty and Stalker cases. In the Jones case, the road was actually constructed and in operation before the settler entered. In the Doughty case, the roadway was merely surveyed and marked out by stakes at the time of the settlers' entry; and the railroad company was held not to have acquired title. In the Stalker case, the road was not constructed at all at the time of the settler's entry and the railroad company acquired title by "relation back" of the approval of the Secretary of the Interior of the plat of the definite location, to the date of its filing in the Local Land Office. In this case as there had been no filing in the Local Land Office there is nothing to relate back to. These three cases contain all "The Law and Prophets" upon the question under consideration, and the only reasonable summary of their holdings is, as said by this court, "That actual construction is the only sufficient act other than compliance with Section 4, to constitute a definite location." As shown above the term "definite location" has a much more comprehensive significance than "fixity of location upon the land."

A roadway "actually constructed" for railroad purposes, must be a railroad within the legal definition of that term. A railroad is according to stand- authority, 1. "A graded road having one or more tracks usually of metal rails supported by sleepers and designed for the passage of rolling stock. 2. The whole system of tracks, stations, rolling stock and machinery used in transportation by rail."

Standard Dictionary.

"A permanent road or way having a line or lines of rails fixed to ties or sleepers and laid to *guage* usually on a leveled or graded ballasted road or roadbed, providing a track for freight cars, passenger cars or coaches and other rolling stock designed to be drawn by locomatives or simetimes propelled by self contained motors; hence such a road or line together with all the lands, buildings, rolling stock, franchises and other assets pertaining thereto and constituting a single property."

Webster's New International Dictionary.

165 That a roadbed in any stage of construction does not come within these definitions is apparent at a glance. Therefore how can the making of an isolated section of grade or roadway be said to constitute either "actual" or "practical" construction of a railroad.

It is therefore respectfully submitted that a rehearing should be granted as to the law and facts upon which the questions suggested in this petition may be fully investigated; or (2) that the Court change its holdings upon the points of law and fact suggested without rehearing; or (3) that the court make full definite and consistent findings upon questions of fact to facilitate a review of its final decision; and (4) that the court revise its holdings upon points of law to accord with the facts as found, consistently with the controlling decisions and authorities hereinbefore referred to.

In conclusion, we beg to offer a suggestion that will be we think, concurred in by counsel for both parties, that this court in its ultimate disposal of the appeal direct that the record be held for a period of 20 or 30 days to enable either party should it see fit to do so to perfect a further appeal.

JOHN KNAUF,
S. E. ELLSWORTH,
Attorneys for Appellant.

166 On the 23d day of October, A. D. 1913 there was filed in this Court the following substituted opinion.

In the Supreme Court, State of North Dakota, April Term, 1913.

NORTHERN PACIFIC RY. CO., Plaintiff and Respondent,
vs.
HARRIET A. BARLOW, Defendant and Appellant.

(1.) A definite location of the right of way of a railway company which will entitle it to the benefits of the Act of Congress of March 3rd, 1875, granting lands to railroads, is made by the completion of the grade ready for the ties and rails which has been preceded by the approval of a plat and profile of such road by the Secretary of the Interior, even though there is no proof that such plat was ever filed in the land office of the district in which the land is situated.

(Syllabus by the Court.)

Appeal from the District Court of Foster County, Burke, J.

Action to quiet title to real estate. Judgment for Plaintiff, Defendant appeals.

Affirmed.

Watson & Young, Fargo, Attorneys for Respondent.

Knauf & Knauf and S. E. Ellsworth, Jamestown, Attorneys for Appellant.

Substituted opinion, filed pursuant to Rule 19, Revised Rules of Practice, after considering petition for re-hearing.

This is an action to determine adverse claims, and to quiet title in the plaintiff to a strip of land 200 feet in width, used as a railroad right of way across the southwest quarter of section 16, township 147, range 66 in Foster County, N. D. In it a counter-claim is filed by the defendant, praying that the title to the land be quieted in her, and that the action of plaintiff be dismissed. The trial court found the issues for the plaintiff, and quieted the title in it. From this judgment this appeal is taken, and a trial de novo is asked. The case came before this court on a prior appeal in the case of Northern Pacific Railway Co. v. Barlow, 20 167 N. D. 197, 126 N. W. 233, Ann. Cas. 1912D, 763, but nothing in that case was decided in relation to the merits; the only question decided being that a stipulation was and must be considered a part of the record. The claim of the railway company to the right of way in question is based upon an alleged compliance with the provisions of the act of Congress of March 3, 1875, granting to railroads the right of way over the public lands of the United States (c. 152, 18 Stat. at L. 482; U. S. Comp. St. 1901, p. 1568).

Knauf & Knauf and S. E. Ellsworth, all of Jamestown, for appellant. Watson & Young, of Fargo, for respondent.

BRUCE, *J.* (after stating the facts as above):

The evidence is undisputed that a survey of the strip in question was made in September and October, 1881, was adopted by action of the board of directors of the Jamestown & Northern Railway Company (the plaintiff's assignors), on October 5, 1882, and was approved by the Secretary of the Interior on June 26, 1883. How long prior to the approval of the plat and profile the same were on file in the office of the Secretary of the Interior does not appear, nor does it appear how the same came into the possession of the Secretary. There is a stipulation, however, which, under the decision in Northern Pac. R. Co. v. Barlow, 20 N. D. 197, 126 N. W. 233, Ann. Cas. 1912*C*, 763, we must recognize, to the effect that "on the said 22d day of July, A. D. 1883, intending to make entry of the said lands therein described when the same was surveyed, and to acquire title to the same by virtue of compliance with the pre-emption laws of the United States, said Frederick G. Barlow settled upon said land and took up his residence thereon. At the time of such settlement there was not a railroad track or line of

railroad in operation across said land at any place, nor had any plat or profile of said railroad extending across said land hereinbefore referred to been filed in the United States District Land Office at Fargo." We find from the evidence that although Barlow entered upon the land upon the 22nd day of July, A. D.
168 1883, the grading of the road across said land was completed prior to May 31, 1883; that is to say, nearly two months before his settlement. We also find the rails were laid upon the grade between August 10 and 15, 1883, and that trains were operated on said road and across said land soon after. Under the stipulation we are constrained to hold that up to the time of said entry no plat had been filed in the local land office, and it is for us, therefore, to determine whether the surveying of a road across a quarter section of government land, the construction on said land of a grade ready for the ties and rails, and the approval of the map and profile of the road and survey by the Secretary of the Interior prior to the entry of the settler give to the railway company title to such right of way which is superior to that of the entryman. We are quite satisfied that it does.

The act of Congress of March 3, 1875 (18 Stat. 482, c. 152) provides, among other things:

"That the right of way through the public lands of the United States is hereby granted to any railroad company duly organized under the laws of any state or territory, except the District of Columbia, or by the Congress of the United States, which shall have filed with the Secretary of the Interior a copy of its articles of incorporation, and due proofs of its organization under the same, to the extent of 100 feet on each side of the central line of said road. * * *

"Sec. 4. That any railroad company desiring to secure the benefits of this act, shall within 12 months after the location of any section of 20 miles of its road, if the same be upon surveyed lands, and, if upon unsurveyed lands, within 12 months after the surveying thereof by the United States, file with the register of the land office for the district where such land is located a profile of its road; and upon approval thereof by the Secretary of the Interior the same shall be noted upon the plats in said office; and thereafter all such lands over which the right of way shall pass shall be disposed of subject to such right of way."

169 The uniform construction of this act has been that it is a grant "in præsenti of lands to be thereafter identified." Jamestown & Northern Ry. Co. v. Jones, 177 U. S. 125, 20 Sup. Ct. 568, 44 L. Ed. 698; Denver & R. G. Ry. Co. v. Alling, 99 U. S. 463, 25 L. Ed. 438. In the case of Jamestown & Northern Ry. Co. v. Jones, 177 U. S. 125, 20 Sup. Ct. 568, 44 L. Ed. 698, it was held that such definite location was made, and a prior right superior to that of subsequent settlers acquired, provided the road was actually constructed across the land in question prior to such entry, and even though no plat had been filed either in the local land office or with the Secretary of the Interior. In the case of Minneapolis, St. Paul & Sault St. Marie Ry. Co. v. Doughty, 208 U. S. 251, 28

Sup. Ct. 291, 52 L. Ed. 474, the court, though affirming the ruling in Jamestown & Northern Ry. Co. v. Jones, supra, held that no such definite location was accomplished by the mere surveying of the line and the driving of stakes, as such location could be easily altered. In the case of Stalker v. Oregon Short Line Co., 225 U. S. 142, 32 Sup. Ct. 636, 56 L. Ed. 1027, the court held that where the road had been physically located and the plats filed, the mere failure of the register of the land office to note the location upon the plats in his office did not affect the right of the railway company. In passing upon the question the court said: "The initiatory act to which the final act of approval relates is the filing with the Secretary of the Interior of the map of definite location. The mere surveying and staking of a route is the tentative act of the railroad. It might at will select a different route and move its stakes. But when it adopts a route definitely and then causes a map of such route to be filed in the land office of the district, in duplicate, and then filed with the Secretary of the Interior, a right is thereby initiated which, until disposed of, rightly precludes the creation of a later right, and gives to the company, as prior in time, pri-
170 ority in right. * * * It is next said that the register did not, after a copy of the approved map of station grounds had been transmitted to him, mark the proper township tract books, as required by the regulations of the Land Department, so as to show the station land selected. This notation on the books of the local land office is for the purpose of giving notice to future enterers. But this was not required to be done until the receipt in the land office of the approved plat of station grounds. That approval did not occur until December 15, 1888. Reed filed his right of pre-emption October 18, 1888, a date antecedent to any possible notation. He could not therefore have been misled, but, on the other hand, had the constructive notice which came from the then pending proceedings before the Secretary of the Interior. But, aside from this, there are two answers to the contention: First, if we are right in holding that the grant vested in the company when the plat was approved, as of the date when filed, the failure of the officer in the district land office to properly mark the plat could not operate to defeat the grant; and, secondly, the railway company, having done everything which it was required by law to do, should not be affected by the negligence of the register in not doing a duty upon which the vesting of title as against the United States did not depend. If the taking effect of the grant had been made to depend upon his properly marking the plat books, there would be no room for the doctrine of relation to the initiatory step of filing the plat of selection. As that is not the case, his neglect to do something not vital to the vesting of title will not defeat the title so vested."

We are quite satisfied from these decisions that what the act of Congress aimed at was a fixity of location; that is to say, a location which the railway company could not change at will in case it later found a route which was more advantageous to it. The Supreme

Court of the United States held, in the case of Jamestown & Northern Ry. Co. v. Jones, supra, that the construction of the road in
171 the absence of the filing of and approval of a plat, constituted a location. It is held in the case of Stalker v. Oregon Short Line, supra, that a notation upon the plat in the local land office was not an initiatory step upon which the right depended. In the case at bar the railroad company had not merely practically constructed the road at the time of the entry, but the plat had been approved at Washington. The facts of the case would come within those of Jamestown & Northern Ry. Co. v. Jones, but for the fact that there is no *r*proof that the ties and rails were laid at the time of the entry, though there is proof that this was the fact some 18 days later. It is, however, stronger than the Jamestown Case on account of the fact that the plat had been approved at Washington, and that the railway company was powerless to then change the location. There can be no doubt, indeed, that the route was fixed, both on account of the physical construction and the difficulty of a subsequent removal, and on account of the fact that its offer of a permanent location had been accepted by the federal authorities. The entryman in this case can have no more ground for complaint than could the entryman in the case of Stalker v. Oregon Short Line, supra. It would be absurd to hold that one who enteres upon land and sees upon it a railroad grade which is only 18 days from physical completion, and, as we have a right to believe, but a link in miles of road stretching across the same prairie, was not aware of this prior railroad occupation. Added to this is the fact that there is no showing that the entryman himself ever asserted any claim against the road, and that a station was put in at or near the point, and named after him, in the neighborhood of which he lived for some time. It is his widow devisee merely who is found to protect. No one would contend that on account of the failure to file the plat in the local land office, he was induced to settle upon land which otherwise he wou-d not have occupied, or that the location of the road did not increase the value of his land, nor is there any evidence to the effect. According to the case of Stalker
172 v. Oregon Short Line, he must be imputed with constructive notice, not merely of the construction of the grade, but of the proceedings at Washington. The fact is that, much as we may clamor for damages when a railroad right of way is sought to be condemned across our lands when railroads are plentiful and near at hand, the proximity of a railroad in a new country is a thing which the intending settler most desires. The question is, after all, one for the Supreme Court of the United States, and not for us to ultimately decide, and all that we can do is to seek to interpret the prior decisions of that tribunal. This we have attempted to do, and our conclusion is that the judgment of the district court should be affirmed, and it is so ordered.

Having passed upon the merits of this case and resolved the controversy in favor of the respondent, it is unnecessary for us to treat the motion to dismiss the appeal with any particularity. It

is sufficient to say that a majority of the court is of the opinion that it lacks in merit.

Burke, J., being disqualified, did not participate.

ANDREW A. BRUCE.
B. F. SPALDING.
C. J. FISK.
E. B. GOSS.

173 On the 23d day of October, A. D. 1913 there was filed in this Court the following Order denying petition for re-hearing filed by appellant herein:

STATE OF NORTH DAKOTA,
In the Supreme Court, ss:

File No. 2436.

NORTHERN PACIFIC RY. CO., Plaintiff and Respondent,
vs.
HARRIET A. BARLOW, Defendant and Appellant.

Appeal from the District Court of Foster County.

This action coming on to be heard at the April A. D. 1913 term of this Court, at the Supreme Court room, in the City of Bismarck, State of North Dakota.

Present: Burleigh F. Spalding, Chief Justice; Charles J. Fisk, Evan B. Goss and Andrew A. Bruce, Associate Justices, and a petition for a rehearing upon the appeal herein having been filed by S. E. Ellsworth for the Appellant and the court having advised thereon, it is now here considered, ordered and adjudged, that the petition be and the same is hereby denied.

And it is further ordered, that this cause be and it is hereby remanded to the District Court for further proceedings according to law, and the judgment of this court.

Dated October 23d 1913.

By the Court.

B. F. SPALDING,
Chief Justice.

[Seal of the Supreme Court, State of North Dakota.]

Attest:
R. D. HOSKINS, *Clerk.*

174 In Supreme Court, State of North Dakota.

NORTHERN PACIFIC RAILWAY COMPANY, Plaintiff and Respondent,
vs.
HARRIET A. BARLOW, Defendant and Appellant.

Petition for Writ of Error.

To Hon. Burleigh F. Spalding, Chief Justice of the Supreme Court of the State of North Dakota:

Now comes Harriet A. Barlow, the defendant named in the above entitled action, by her attorneys John Knauf and S. E. Ellsworth, and would show unto this honorable court that in the record and proceedings and rendition of a judgment and decree entered on the 23rd day of October, A. D. 1913 in the above entitled action by the supreme court of the State of North Dakota, it being the highest court of said state in which a decision could be had in the said suit between Northern Pacific Railway Company as plaintiff and Harriet A. Barlow as defendant, manifest error has occurred greatly to her damage, whereby the said defendant and petitioner feels aggrieved.

That in the record and proceedings of said cause before said Supreme Court, it will appear that there was drawn in question the construction to be given certain statutes of the United States, to-wit: Sections 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266 and 2267, Revised Statutes of the United States and laws of the United States supplementary and amendatory thereto, particularly an act of Congress approved May 4th, 1880, entitled An act for relief of settlers on public lands; and an act of Congress dated March 3rd, 1875, entitled An Act granting to railroads the right of way through the public lands of the United States; and that the decisions of said Supreme Court of North Dakota was against the right, title and privilege set up and claimed by said defendant under said statutes of the United States; all of which is fully apparent in the record and proceedings of the case and specifically set forth in the assignment of errors filed herewith.

Wherefore your petitioner prays that her appeal be allowed
175 and that a transcript of the record, proceedings and papers upon which said order, judgment and decree were made, duly authenticated, be ordered sent to the Supreme Court of the United States at Washington, D. C., under the rules of said court in such case made and provided, that the same may be inspected and corrected as according to law, and justice should be done.

JOHN KNAUF,
S. E. ELLSWORTH,
Attorneys for Defendant.

Allowed:
BURLEIGH F. SPALDING,
Chief Justice of the Supreme Court of the State of North Dakota.

Dated Bismarck, No. Dak., May 6th, A. D. 1914.

On the 16th day of June, A. D. 1914 there was filed in this Court the foregoing petition for writ of error.

176 In Supreme Court, State of North Dakota.

NORTHERN PACIFIC RAILWAY COMPANY, Plaintiff and Respondent,
vs.
HARRIET A. BARLOW, Defendant and Appellant.

Order Allowing Writ of Error.

On this 6th day of May, A. D. 1914, came on to be heard the application of Harriet A. Barlow, defendant, said defendant being represented by counsel, for a writ of error,

And it appearing, to the court from the petition filed herein and the record filed therewith, that the application ought to be granted and that a transcript of the record and proceedings and papers upon which the judgment of the court was rendered, properly certified should be sent to the Supreme Court of the United States as prayed for in said petition, that such proceedings should be had as will be just in the premises,

It is therefore ordered that the writ of error be allowed upon the said defendant Harriet A. Barlow giving bond conditioned as the law directs in the sum of $500.00 and that a true copy of the record, assignment of errors and all proceedings had in the case in the Supreme Court of the State of North Dakota, shall be transmitted to the Supreme Court of the United States properly certified as the law directs, that the said court may inspect the same and do what according to law should be done.

BURLEIGH F. SPALDING,
Chief Justice of the Supreme Court
of the State of North Dakota.

On the 16th day of June, A. D. 1914 there was filed in this Court the foregoing Order Allowing Writ of Error.

177 Supreme Court of the United States, October Term, 1914.

HARRIET A. BARLOW, Plaintiff in Error,
vs.
NORTHERN PACIFIC RAILWAY COMPANY, Defendant in Error.

Assignment of Errors.

The plaintiff in error above named respectfully submits that the Supreme Court of the State of North Dakota in its decision, judgment and decree on appeal, dated October 23, 1913, in an action in which Harriet A. Barlow, the plaintiff above named was defendant and appellant and Northern Pacific Railway Company, the defend-

ant in error above named, was plaintiff and respondent, erred in this:

1. The court erred in holding that a definite location of the right of way of a railway company which will entitle it to the benefits of Act Cong. March 3, 1875, c. 152, 18 Stat. 482 (U. S. Comp. St. 1901, p. 1568), granting lands to railroads, is made by the completion of the grade ready for the ties and rails, which has been preceded by the approval of a plat and profile of such road by the Secretary of the Interior, even though there is no proof that such plat was ever filed in the land office of the district in which the land is situated.

2. The court erred in holding that the defendant in error above named is the owner for a right of way for railroad purposes, of a strip of land two — (200) feet in width, that is to say, one hundred (100) feet on each side of the centre line of said railroad as the same has been heretofore constructed and is now in operation over and across the following described land, to-wit:

The Southwest Quarter (S. W. ¼) of Section six (6), Township One Hundred Forty Seven (147) North of Range Sixty-six (66) West, in Foster County, North Dakota.

3. The court erred in holding that the plaintiff's claim to the land above described based upon compliance with the public land laws of the United States, and a patent issued to the devisee of plaintiff in error is without foundation of merit.

178 4. The court erred in holding that the claim of the plaintiff in error to the land hereinbefore described is null and void; and that plaintiff in error claiming under a patent of the United States as aforesaid, has no estate or interest in said property.

5. The court erred in holding that the claim and title of defendant in error to the land hereinbefore described, based upon compliance with the provisions of the Act of March 3, 1875, granting to the Railroads the right of way through the public lands of the United States, should be quieted as to the claim of plaintiff in error and that said plaintiff be forever debarred and enjoined from further asserting such claim to said property.

6. The court erred in holding that the counter claim anc cause of action of plaintiff in error should be dismissed and assessing against her the costs of said action.

7. The court erred in affirming and sustaining the judgment and decree rendered in the district court of the Fifth Judicial District for the county of Foster, North Dakota, against the plaintiff in error and in favor of defendant in error, declaring said defendant in error to be the owner *for* a right of way for railroad purposes, of the strip of land hereinbefore described; and that the title of said defendant in error should be quieted against the claim of plaintiff in error.

JOHN KNAUF,
S. E. ELLSWORTH,
Attorneys for Plaintiff in Error.

On the 16th day of June, A. D. 1914 there was filed in this Court the foregoing Assignment of Errors.

179 In Supreme Court, State of North Dakota.

NORTHERN PACIFIC RAILWAY COMPANY, Plaintiff and Respondent,
vs.
HARRIET A. BARLOW, Defendant and Appellant.

Bond on Appeal.

Know all men by these presents that we, Harriet A. Barlow, the defendant and appellant above named, as principal and The United States Guaranty Company of Baltimore, Maryland, as surety, are held firmly bound unto the United States of America in the full and just sum of Five Hundred dollars ($500.00) to be paid to the United States of America, to which payment well and truly to be paid we bind ourselves, our successors and assigns jointly and severally by these presents.

Whereas, the above named Harriet A. Barlow, defendant and appellant as aforesaid, hath prosecuted a Writ of Error in the Supreme Court of the United States, to reverse the judgment rendered in the above entitled action by the Supreme Court of North Dakota on the 23rd day of October, A. D. 1913.

Now Therefore, the condition of this obligation is such that if the above named Harriet A. Barlow shall prosecute her said Writ of Error with effect and answer all costs and damages if she should fail to make good her plea, then this obligation shall be void; otherwise, to remain in full force and effect.

Sealed with our seals and dated this 21st day of May, A. D. 1914.

HARRIET A. BARLOW,
Principal.

[CORP. SEAL.] UNITED STATES FIDELITY & GUARANTY COMPANY,
By ALFRED STEEL,
Its Attorney in Fact.

HARRIET A. BARLOW,
By S. E. ELLSWORTH,
Her Attorney.

180 STATE OF NORTH DAKOTA,
County of Stutsman, ss:

On this 21 day of May, A. D. 1914, before me a Notary Public in and for the county and state aforesaid, personally appeared S. E. Ellsworth, known to me to be the person who is described in and whose name is subscribed to the foregoing undertaking as attorney for Harriet A. Barlow, and acknowledged to me that by her authority he subscribed thereto the name of Harriet A. Barlow as principal and his own name as her attorney.

ALFRED STEEL, [SEAL.]
Notary Public, Stutsman Co., N. Dam.

My commission expires April 13-1915.

STATE OF NORTH DAKOTA,
County of Stutsman, ss:

On this 21 day of May, A. D. 1914, before me a Notary Public in and for the county and state aforesaid, personally appeared Alfred Steel, known to me to be the person who is described in and whose name is subscribed to the foregoing Undertaking as the attorney in fact of the United States Fidelity & Guaranty Company and acknowledged to me that he subscribed the name of said The United States Fidelity & Guaranty Company thereto as principal and his own name as attorney in fact.

[SEAL.] J. E. MATTISON,
Notary Public, Stutsman Co., N. D.

My commission expires Feb'y 7-1919.

Approved this 16th day of June, 1914.

B. F. SPALDING,
Chief Justice Supreme Court of N. Dak.

On the 16th day of June, A. D. 1914 there was filed in this Court the foregoing Bond on Appeal.

181 Supreme Court of the United States, October Term, 1914.

HARRIET A. BARLOW, Plaintiff in Error,
vs.
NORTHERN PACIFIC RAILWAY COMPANY, Defendant in Error.

Admission of Service of Assignment of Error.

Service of the within assignment of error is hereby admitted this 22nd day of December, A. D. 1914, at Fargo, North Dakota.

WATSON & YOUNG,
Attorneys for Defendant in Error.

182 Supreme Court of the United States, October Term, 1914.

HARRIET A. BARLOW, Plaintiff in Error,
vs.
NORTHERN PACIFIC RAILWAY COMPANY, Defendant in Error.

Assignment of Error.

The plaintiff in error above named respectfully submits that the Supreme Court of the State of North Dakota in its decision, judgment and decree on appeal, dated October 23, 1913, in an action in which Harriet A. Barlow, the plaintiff above named was defendant and appellant and Northern Pacific Railway Company, the defendant in error above named, was plaintiff and respondent, erred in this:

1. The court erred in holding that a definite location of the right of way of a railway company which will entitle it to the benefits of Act Cong. March 3, 1875, c. 152, 18 Stat. 482 (U. S. Comp. St. 1901, p. 1568), granting lands to railroads, is made by the completion of the grade ready for the ties and rails, which has been preceded by the approval of a plat and profile of such road by the Secretary of the Interior, even though there is no proof that such plat was ever filed in the land office of the district in which the land is situated.

2. The court erred in holding that the defendant in error above named is the owner of a right of way for railroad purposes, of a strip of land two — (200) feet in width, that is to say, one hundred (100) feet on each side of the centre line of said railroad as the same has been heretofore constructed and is now in operation over and across the following described land, to-wit:

183 The Southwest Quarter (S. W. ¼) of Section six (6), township One Hundred Forty Seven (147) North of Range Sixty-six (66) West, in Foster County, North Dakota.

3. The court erred in holding that the plaintiff's claim to the land above described based upon compliance with the public land laws of the United States, and a patent issued to the devise-s of plaintiff in error is without foundation or merit.

4. The court erred in holding that the claim of the plaintiff in error to the land hereinbefore described is null and void; and that plaintiff in error claiming under a patent of the United States as aforesaid, has no estate or interest in said property.

5. The court erred in holding that the claim and title of defendant in error to the land hereinbefore described, based upon compliance with the provisions of the Act of March 3, 1875, granting to the Railroads the right of way through the public lands of the United States, should be quieted as to the claim of plaintiff in error and that said plaintiff be forever debarred and enjoined from further asserting such claim to said property.

6. The court erred in holding that the counter claim and cause of action of plaintiff in error should be dismissed and assessing against her the costs of said action.

7. The court erred in affirming and sustaining the judgment and decree rendered in the district court of the Fifth Judicial District for the county of Foster, North Dakota, against the plaintiff in error and in favor of defendant in error, declaring said defendant in error to be the owner of a right of way for railroad purposes, of the strip of land hereinbefore described; and that the title of said defendant in error should be quieted against the claim of plaintiff in error.

A. L. KNAUF,
S. E. ELLSWORTH,
Attorneys for Plaintiff in Error.

184 [Endorsed:] 642/24386. Original. Supreme Court of the United States. Harriet A. Barlow, Plaintiff, vs. Northern Pacific Ry. Co., Defendant. Assignment of Error. Admission of Service.

185 In Supreme Court, United States, October Term, 1914.

HARRIET A. BARLOW, Plaintiff in Error,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, Defendant in Error.

Designation of Matter for Printed Transcript.

To the Clerk of the Supreme Court of the United States:

You will please take notice that the plaintiff in error above named, designates as those parts of the record which said plaintiff in error thinks necessary for a consideration of the errors relied upon in this appeal, and indicates and proposes as the portions of the record filed herein to be incorporated in the printed transcript of record, the following, to-wit: Summons; Complaint; Stipulation of counsel as to the facts; Statement of the case as prepared and certified by the District Court of Foster County; Findings of Fact; conclusions of Law and Order for Judgment and Judgment of said District Court; Order to Show Cause why said Findings of Fact, Order for Judgment, and Judgment and the Stipulation of Fact made by counsel herein, should not be set aside; Order of the District Court setting aside Findings of Fact, Conclusions of Law, Order for Judgment and Stipulation of Fact made by counsel; Notice and Undertaking on appeal from last named order; Opinion of Supreme Court of North Dakota on appeal from said order; Remittitur of Supreme Court; Order of District Court reversing the Order setting aside Findings of Fact, Conclusions of Law, Judgment and Stipulation of Fact; Notice and Undertaking on Appeal from Judgment as reinstated; Statement of the case prepared and used by appellant on appeal from Judgment; Opinion of Supreme Court of North Dakota on appeal from Judgment; Remittitur of Supreme Court; Petition for Writ of Error; Order Allowing Writ of Error; Writ of Error; Undertaking; Citation with Admission of Service; and Assignment of Error.

Dated December 8, A. D. 1914.

A. L. KNAUF,
S. E. ELLSWORTH,
Counsel for Plaintiff in Error.

Service of the above Designation of matter for Printed Transcript is hereby admitted this 22 day of December, A. D. 1914.

WATSON & YOUNG,
Counsel for Defendant in Error.

186 [Endorsed:] 642/24386. Original. Supreme Court of the United States. Harriet A. Barlow, Plaintiff, vs. Northern Pacific Ry. Co., Defendants. Designation of Matter for Printed Transcript. Admission of Service.

187 [Endorsed:] File No. 24386. Supreme Court U. S. October Term, 1914. Term No. 642. Harriet A. Barlow, Pl'ff in Error, vs. Northern Pacific Railway Company. Assignment of errors and designation by plaintiff in error of parts of record to be printed and proof of service of same. Filed January 2, 1915.

Endorsed on cover: File No. 24,386. North Dakota Supreme Court. Term No. 257. Harriet A. Barlow, plaintiff in error, vs. Northern Pacific Railway Company. Filed October 1st, 1914. File No. 24,386.

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Supreme Court of the United States.

OCTOBER TERM, 1915.

No. 257.

HARRIET A. BARLOW,

Plaintiff in Error,

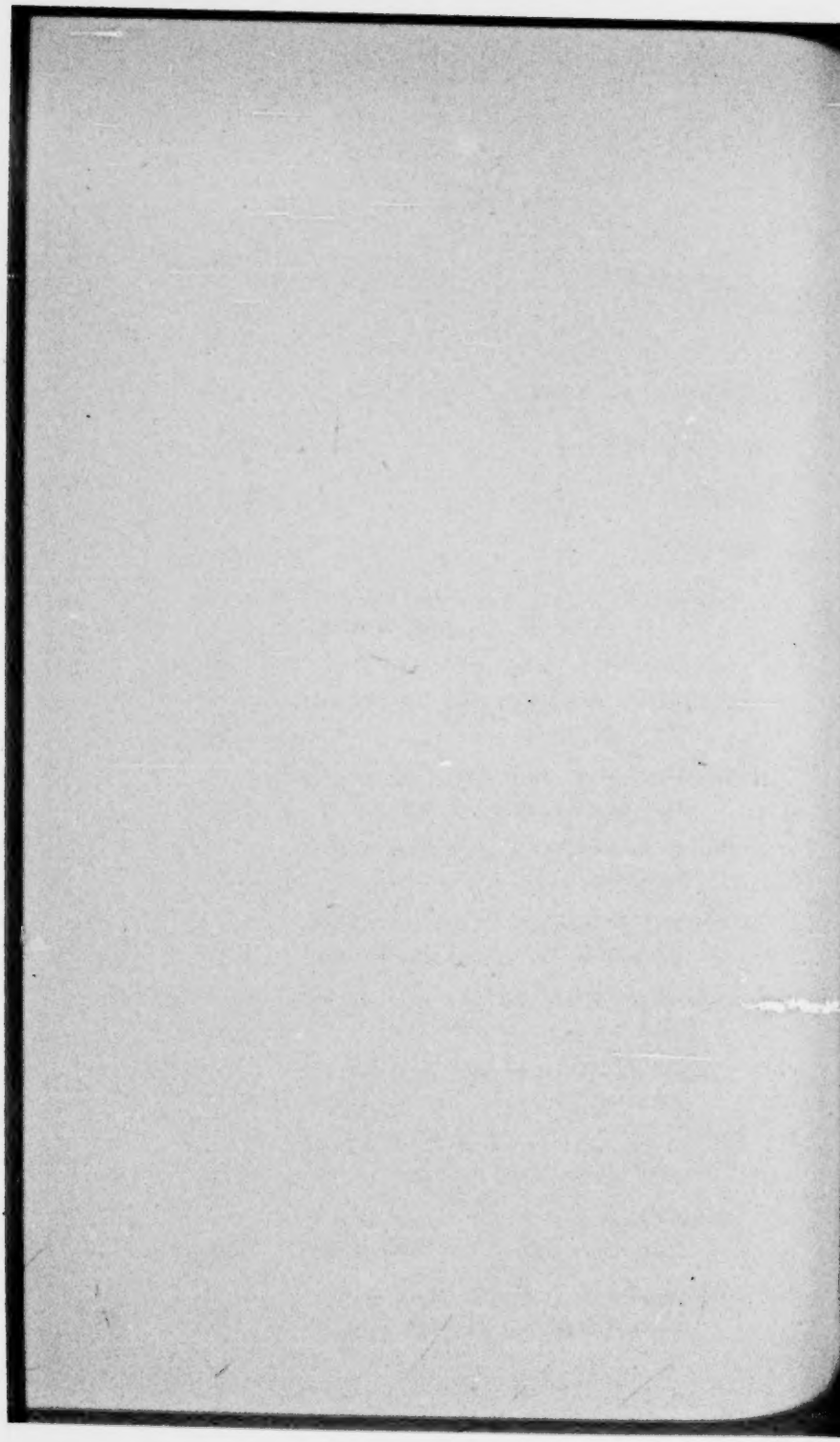
vs.

NORTHERN PACIFIC RAILWAY COMPANY.

In Error to the Supreme Court of the State of North Dakota.

Brief for Plaintiff in Error.

JOHN KNAUF,
S. E. ELLSWORTH,
Counsel for Plaintiff in Error.



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Supreme Court of the United States.

OCTOBER TERM, 1915.

No. 257.

HARRIET A. BARLOW,

Plaintiff in Error,

vs.

NORTHERN PACIFIC RAILWAY COMPANY.

In Error to the Supreme Court of the State of North Dakota.

Brief for Plaintiff in Error.

The figures in parentheses refer to the pages of the printed Transcript of Record.

STATEMENT.

This cause comes before this court for review upon Writ of Error to the Supreme Court of the State of North Dakota. The action was originally brought by defendant in error in the district court of the County of Foster, State of North Dakota, as a suit in equity to quiet title to a strip of land 200 feet in width to be used as a railroad right of way extending entirely across a quarter section of land owned by plaintiff in error.

A determination of the rights claimed in this suit by defendant in error involves the construction of an Act of Congress approved March 3, 1875 granting a right of way across public lands of the United States to certain railroad companies; the language of which Act so far as it is relevant to the issues of this case, is as follows:

"Be it enacted, &c., That the right of way through the public lands of the United States is hereby granted to any railroad company duly organized under the laws of any State or Territory, except the District of Columbia, or by the Congress of the United States, which shall have filed with the Secretary of the Interior a copy of its articles of incorporation, and due proofs of its organization under the same, to the extent of one hundred feet on each side of the central line of said road; also the right to take, from the public lands adjacent to the line of said road, material, earth, stone, and timber necessary for the construction of said railroad; also ground adjacent to such right of way for station buildings, depots, machine shops, side tracks, turn-outs, and water stations, not to exceed in amount twenty acres for each station, to the extent of one station for each ten miles of its road."

Sec. 2. * * * *

Sec. 3. That the legislature of the proper Territory may provide for the manner in which private lands and possessory claims on the public lands of the United States may be condemned; and where such provision shall not have been made, such condemnation may be made in accordance with section three of the act entitled, "An act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the Government the use of the same for postal, military, and other purposes, approved July first, eighteen hundred and sixty-two,' approved July second, eighteen hundred and sixty-four."

Sec. 4. That any railroad company desiring to secure the benefits of this act, shall, within twelve months after the location of any section of twenty miles of its road, if the same be upon surveyed lands, and, if upon unsurveyed lands, within twelve months after the survey thereof by the United States, file with the register of the land office for the district where such land is located a profile of its road; and upon approval thereof by the Secretary of the Interior the same shall be noted upon the plats in said office; and thereafter all such lands over which such right of way shall pass shall be disposed of subject to such right of way: Provided, That if any section of said road shall not be completed within five years after the location of said section, the rights herein granted shall be forefeited as to any such uncompleted section of said road."

The action was brought in the district of Foster County, about the 6th day of September, 1902. On November 8, 1903, counsel for plaintiff and defendant entered into a stipulation in writing which was intended to dispense with the necessity of proof of all the facts at issue with the single exception of the question as to the amount of railroad construction done upon the lands of defendant's devisor at the time of his settlement. Upon the point of fact not covered by the stipulation several depositions were taken which appear in the Transcript of Record.

The case was finally tried by the district court in March of the year 1908, under a statute of the State of North Dakota which provides that "In all actions tried by the district court without a jury, in which an issue of fact has been joined, * * * all the evidence offered on the trial shall be received. * * * A party desir-

ing to appeal from a judgment in any such action, shall cause a statement of the case to be settled within the time and in the manner prescribed by article 8 of chapter 10 of this code, and shall specify therein the questions of fact that he desires the supreme court to review, and all questions of fact not so specified shall be deemed on appeal to have been properly decided by the trial court. Only such evidence as relates to the questions of fact to be reviewed shall be embodied in this statement. But if the appellant shall specify in the statement that he desires to review the entire case, all the evidence and proceedings shall be embodied in the statement. All incompetent and irrelevant evidence, properly objected to in the trial court, shall be disregarded by the supreme court, but no objection to evidence can be made for the first time in the supreme court. The supreme court shall try anew the question of fact specified in the statement or in the entire case if the appellant demands a retrial of the entire case, and shall finally dispose of the same whenever justice can be done without a new trial, and either affirm or modify the judgment or direct a new judgment to be entered in the district court; the supreme court may, however, if it deem such course necessary to the accomplishment of justice, order a new trial of the action."

Revised Codes, North Dakota, 1899, Sec. 5630.

Revised Codes, North Dakota, 1905, Sec. 7229.

Compiled Laws, North Dakota, 1913, Sec. 7846.

After the conclusion of the trial, on May 7, 1908, the district court made findings of fact and ordered the entry of a judgment in favor of the plaintiff in that action, quieting title to the right of way claimed by it. (53-59) From the judgment so entered an appeal was taken to the Supreme Court of the State of North Dakota, by the defendant in that action, now the plaintiff in error here, who upon said appeal demanded a review of the entire case in the Supreme Court in accordance with the provisions of sections 5630 Revised Codes, North Dakota, 1899, quoted above. The Supreme Court of North Dakota having reviewed the questions of law and fact presented by this appeal, filed an opinion and order on September 9, 1913, in which it was declared that the judgment of the district court for Foster County, was affirmed. After consideration of a petition for rehearing filed by the defendant and appellant, the supreme court modified its opinion in some particulars and on October 23, 1913, filed a substituted opinion and denied appellant's motion for a rehearing (122-127). The Writ of Error issued from this court is for the purpose of obtaining a review of the decision of the Supreme Court of North Dakota and its findings and holdings in determining the validity of the rights of plaintiff in error claimed under certain Federal statutes and particularly the Act of Congress of March 3, 1875, quoted above.

By undisputed and agreed facts submitted both to the district court of Foster County and to the supreme court of North Dakota, upon its

review of the case, it appears that on the 17th day of September, 1881, the Jamestown & Northern Railroad Company, to whom defendant in error is the legal successor in interest was organized under the laws of the Territory of Dakota and chartered to build a line of railroad from Jamestown, North Dakota in a northwesterly direction through Foster and other counties to the west end of Devils Lake. After its organization the said railroad company authorized and directed the survey of a line of road from a point near the City of Jamestown in a northwesterly direction through Foster and other counties, which survey was completed on the 30th day of October, 1881, and in its course passed across the land belonging to the devisor of plaintiff in error. A map or plat of such survey was prepared and on the 5th day of October, 1882, adopted by resolution of the Board of Directors of said Railroad Company. This plat or map together with a certificate of the due organization of the railroad company under the laws of the Territory of Dakota, and an affidavit of its president designating the officers of said corporation, were transmitted to the Secretary of the Interior and received in the Department of the Interior on January 26, 1883. This map or plat was approved by the Secretary of the Interior as shown by his official endorsement thereon, on July 26, 1883, and was filed in the United States Land office at Fargo, North Dakota, some time during the month of August, 1883.

The plaintiff in error is the heir and sole devisee of her husband Frederick G. Barlow, who on the 22nd of July, 1883, being a qualified preemptor under the laws of the United States, settled upon the land in question across which the right of way is claimed by defendant in error, and continued to reside upon and improve this land until the 7th day of November, 1888 when after due and acceptable proofs of his right thereto, he received from the Government of the United States a patent granting and conveying to him the land in question without limitation reservation, or deduction of any kind or for any purpose whatever.

In the judgment rendered by the district court of Forter county and affirmed by the supreme court of North Dakota, there is a great confusion in the finding of fact as to the time when the plat of definite location prepared by the Jamestown & Northern Railway Company, was filed in the local land office at Fargo, North Dakota. The stipulation of fact entered into between counsel for plaintiff and defendant, contains an express admission of the fact that on July 22, 1883, at the time of the settlement of Frederick G. Barlow "there was not a railroad track laid or line of railroad in operation across said land at any place nor had the plat or profile of the section of railroad extending across said land hereinbefore referred to been filed in the United States District Land Office at Fargo," (14)

This stipulation of fact also contained a statement "that the map of definite location above referred to and approved by the Secretary of the Interior on July 26, 1883, was filed in the United States Land Office at Fargo some time during the month of August, 1883 (12)." Both of these facts were undisputed upon the trial in district court of said cause and were accepted as true by counsel for both parties.

In the finding of fact made by the district court as the basis of its judgment in favor of defendant in error, the exact words above quoted from the stipulation of fact, are found in the latter part of finding VII (57). Finding XI however, contains the contradictory statement "I further find that the profile and map referred to in the third finding were in fact filed in the local United States Land Office at Fargo, North Dakota being the Land Office for the District in which said land in controversy in this action were situated, at some time prior to June 26, 1883, and was by the officers of said Land Office transmitted to the Commissioner of the General Land Office at Washington, D. C. (58).

Upon discovery by counsel for defendant in error, of this contradictory condition of the findings of fact, application was made to the district court to set aside the judgment entered in favor of the plaintiff in that action, together with the findings of fact and conclusions of law entered as its basis; and to modify the stipulation of fact entered into by counsel on November 8, 1903, "by excluding or striking therefrom the last clause of

the seventh paragraph thereof (60-61)." The last clause of the seventh paragraph of the district court's finding as noted above, contained that part of the the agreed statement of fact quoted above to the effect that at the time of the settlement of Frederick G. Barlow on July 22, 1883, the map or plat of definite location had not been filed in the United States District Land Office at Fargo. The district court of Foster County thereupon made an order relieving the railroad company from this clause of the stipulation of fact made by its counsel as aforesaid (84); but upon appeal from this order of the district court to the Supreme Court of North Dakota, a judgment and opinion was entered vacating the order in question and holding that the stipulation of fact having been deliberately entered into by defendant in error for a due consideration, could not be avoided in this manner (90-100).

The effect of this order of the Supreme Court was to reinstate the original judgment of the district court which together with its findings and conclusions of law had been temporarily vacated and set aside by the same order by which the district court attempted to relieve defendant in error from its stipulation of fact. Thereupon an appeal was taken by the defendant in that action, now the plaintiff in error here, to the Supreme Court of North Dakota from the provisions of the decree (103-104). This appeal as hereinbefore shown, resulted in an opinion and order of the Supreme Court by which the judgment of the district court was affirmed without modification.

Although by the provisions of the State statute hereinbefore quoted, owing to the manner in which this appeal was taken, the Supreme Court was authorized to try anew the entire case and to either "affirm or modify the judgment or direct a new judgment to be entered in the district court," it saw fit to give its approval without modification to the judgment of the district court notwithstanding the confusion existing in the findings of fact. The contradictory condition of these findings of fact was explicitly called to the attention of the Supreme Court both in the briefs of appellant and in the petition for rehearing (112). The findings of the district court as they come before this court, are therefore, affirmed by the Supreme Court without any attempt to correct or render consistent the findings of fact. The Supreme Court in its opinion, however, holds, "There is a stipulation, however, which, under the decision in Northern Pac. R. Co. v Barlow, 20 N. D. 197, 126 N. W. 233, we must recognize, to the effect that "on the said 22d day of July, A. D. 1883, intending to make entry of the said lands therein described when the same was surveyed, and to acquire title to the same by virtue of compliance with the pre-emption laws of the United States, said Frederick G. Barlow settled upon said land and took up his residence thereon. At the time of such settlement there was not a railroad track or line of railroad in operation across said land at any place, nor had any plat or profile of said railroad extending across said land hereinbefore referred to been filed in the United States District Land Office at Fargo, (123-124).

Regarding the amount of construction upon the right of way claimed by defendant in error prior to and immediately after the settlement of Barlow, the Supreme Court held "We find from the evidence that although Barlow entered upon the land upon the 22nd day of July, A. D. 1883, the grading of the road across said land was completed prior to May 31, 1883; that is to say, nearly two months before his settlement. We also find the rails were laid upon the grade between August 10 and 15, 1883, and that trains were operated on said road and across said land soon after (124).

The Supreme Court further held in its opinion, "In the case at bar the railroad company had not merely practically constructed the road at the time of the entry, but the plat had been approved at Washington. The facts of the case would come within those of Jamestown & Northern Ry. Co. v. Jones, but for the fact that there is no proof that the ties and rails were laid at the time of the entry, thought there is proof that this was the fact some 18 days later. It is, however, stronger than the Jamestown Case on account of the fact that the plat had been approved at Washington, and that the railway company was powerless to then change the location. There can be no doubt, indeed, that the route was fixed, both on account of the physical construction and the difficulty of a subsequent removal, and on account of the fact that its offer of a permanent location had been accepted by the Federal authorities. The entryman in this case can have no more ground for complaint than could the entryman in the case of Stalker v. Oregon Short Line, supra. It would be absurd to hold that one who enters upon land and sees upon it a railroad grade which is only 18 days from physical completion, and, as we have a right to believe, but a link in miles of road stretching across the same prairie, was not aware of this prior railroad occupation. Added to this is the fact that there is no showing that the

entryman himself ever asserted any claim against the road, and that a station was put in at or near the point, and named after him, in the neighborhood of which he lived for some time. It is his widow devisee merely who is found to protest. No one would contend that on account of the failure to file the plat in the local land office, he was induced to settle upon land which otherwise he would not have occupied, or that the location of the road did not increase the value of his land, nor is there any evidence to the effect (126)."

The finding of fact by the Supreme Court that the grading of the road across the land was completed prior to May 31st, 1883 and that the rails were laid upon the grade between August 10 and 15th, 1883, was protested by counsel for plaintiff in error in his petition for rehearing as being clearly against the great preponderance of the evidence on these points. The findings that the construction of a railroad across plaintiff's land was practically complete and "a link in miles of road stretching across the same prairie" and within "only 18 days from physical completion;" that the "entryman Barlow himself never asserted any claim against the road;" that "no one would contend that on account of the failure to file the plat in the local land office he was induced to settle upon land which otherwise he would not have occupied," were also brought to the attention of the Supreme Court as being without any support whatever in the evidence (115-118).

The substituted opinion of the Supreme Court filed on October 23, 1913, made no change or modification whatever in these findings of fact;

and the record opinion upon the contested issue of the amount of constructive work done upon the railroad on July 22, 1883, is to the effect that the grading of the road-bed was completed before May 31, and that the rails were laid between August 10 and 15; and that trains were operated across said land soon after.

This record wholly unmodified therefore presents a state of fact under which it appears that the plat of definite location prepared by the predecessor in interest of defendant in error, was not filed in the local land office until a month or more after the settlement upon the land of the devisor of plaintiff in error; and that the section of the railroad extending across this land was not completed or in condition for the operation of trains thereon from a minimum of 18 days to a maximum of a month or more after settlement was made.

ASSIGNMENT OF ERROR.

1. The court erred in holding that a definite location of the right of way of a railway company which will entitle it to the benefits of Act. Cong. March 3, 1878, c. 152, 18 Stat. at L 482, U. S. Comp. St. 1901, p. 1568, granting lands to railroads, is made by the completion of the grade ready for the ties and rails, which has been preceded by the approval of a plat and profile of such road by the Secretary of the Interior, even though there is no proof that such plat was ever filed in the land office of the district in which the land is situated.

2. The court erred in holding that the defendant in error above named is the owner of a right of way for railroad purposes, of a strip of land two hundred (200) feet in width, that is to say, one hundred (100) feet on each side of the entire line of said railroad as the same has been heretofore constructed and is now in operation over and across the following described land, to-wit:— The Southwest Quarter (SW¼) of Section six (6), Township One Hundred Forty-seven (147) north, of Range Sixty-six (66) West, in Foster County, North Dakota.

3. The court erred in holding that the plaintiff's claim to the land above described based upon compliance with the public land laws of the United States, and a patent issued to the devisor of plaintiff in error, is without foundation or merit.

4. The court erred in holding that the claim of the plaintiff in error to the land hereinbefore described is null and void; and that plaintiff in error claiming under a patent of the United States as aforesaid, has no estate or interest in said property.

5. The court erred in holding that the claim and title of defendant in error to the land hereinbefore described, based upon compliance with the provisions of the Act of March 3, 1875, granting to railroads the right of way through the public lands of the United States, should be quieted as to the claim of plaintiff in error and that said plaintiff be forever debarred and enjoined from further asserting such claim to said property.

6. The court erred in holding that the counter claim and cause of action of plaintiff in error should be dismissed and assessing against her the costs of said action.

7. The court erred in affirming and sustaining the judgment and decree rendered in the district court of the Fifth Judicial District for the County of Foster, North Dakota, against the plaintiff in error and in favor of defendant in error, declaring said defendant in error to be the owner of a right of way for railroad purposes, of the strip of land hereinbefore described; and that the title of said defendant in error should be quieted against the claim of plaintiff in error.

ARGUMENT.

I.

As hereinbefore stated, there is a great confusion and contradiction in the findings of the District Court in reference to the time when the profile or map of definite location of the railroad right of way claimed by defendant in error was filed in the local Land Office at Fargo. The finding of the Supreme Court that it must recognize a stipulation of counsel to the effect that at the time of settlement of Frederick G. Barlow "there was not a railroud track or line of railroad in operation across said land at any place nor had any plat or profile of said railroad extending across said land been filed in the United States District Land Office at Fargo," clears to some extent, this confusion and fixes definitely the status at the date of settlement. The findings of the Supreme Court to the effect that the "grading for the railroad across the land in controversy was completed prior to May 31, 1883; that the rails were laid upon the grade between August 10th and 15th, 1883; and that trains were operating on said road across said land soon after," is the subject of much controversy; and if permissible under the rules of this court, in this class of cases, and in the state of the record now here upon this Writ of Error, it is requested that the evidence be reviewed by this court, and the true conditions at the dates aforesaid determined.

As appears from the statement of fact this court is now asked to review the record of an action in equity brought in a state court of North

Dakota, which was required by the statute in force to receive all evidence offered; and was taken on appeal to a Supreme Court tnat was authorized to try anew all questions of fact presented by the full record, and to finally dispose of the same by either affirming or modifying the judgment entered, or directing a new jugdment to be entered in the District Ceurt. The entire evidence offered upon the trial in the lower court was therefore part of the record presented to the highest court of the state; and the Supreme Court in hearing the appeal was endowed with all the functions of the lower court in its determination of the facts. It is therefore, respectfully submitted that a rule adopted in this court and never modified so far as shown by the adjudged cases, in investigating and determing the validity of the rights of plaintiff in error under the Federal Statute inquiry may be made into questions both of law and fact.

"In chancery cases or in any other class of cases where all the evidence becomes a part of the record in the highest court of the state, and the record is brought here, this court can review the decision of that court *on both the law and fact* so far as may be necessary to determine the validity of the right so set up under the of Act of Congress." (Italics ours.)

Republican River Bridge Co. vs. Kansas Pacific Ry. Co., 92 U. S. 315.

It is not believed that the determination of these points of fact in a manner different from the findings of the State Supreme Court is essential or indeed material to the legal contentions

presented by the plaintiff in error. That Court however, seems to place great stress upon the point of an advanced stage of "physical construction" of the railroad at the date of settlement upon the land; and to give emphasis to the idea that the idea that the railroad was at that date "practically completed." While we believe that "actual construction" of the railroad and not "practical completeness" is the determining factor of the law of this case, nevertheless, if the final disposal of this case should depend upon a delicate adjustment of considerations such as these, and under the practices of this court such a request may be properly made, it is asked that the slender basis of fact on which the State Supreme Court bases certain of its findings, be examined. It will then be seen that the evidence of these facts which the Supreme Court holds to be convincing and preponderating is based almost entirely upon certain unofficial memoranda entered in the engineering department of the Jamestown & Northern Railroad Company, in the years 1882 and 1883 more than 20 years before these documents were introduced in evidence. The finding that rails were laid upon the railroad grade between August 10th and 15th, 1883, is not sustained by these documents however, but is based upon the uncorroborated recollection of one witness (40-41) and upon the surmise of another (33); while it is directly contradicted by one of the railroad company's witnesses, a contractor engaged in constructing the road, who stated that "the iron was laid at Barlow and over the land in question

probably some time in October," (38). Directly opposed to this is the testimony of three disinterested witnessess who lived in the vicinity of the land at the time of the railroad construction in 1883, to the effect that in that year the grade was not thrown up on the land until after the time of settlement. (Testimony of Estabrook, Greitl, Buchanan, 41-53).

Yet however much confusion there may be on the points of the dates of construction of the railroad grade and the actual completion and operation of the railroad, the material facts stand out with great distinctness, that at the time of the settlement of F. G. Barlow, the devisor of plaintiff in error, on July 22, 1883, "there was not a railroad track laid or line of railroad in operation across said land at any place nor had the plat or profile of the section of railroad extending across said land been filed in the United States District Land Office at Fargo." This state of fact the State Supreme Court held that it must recognize as existing; and we shall seek to show, this finding is amply sufficient to call for the application of the construction of the Act of March 3, 1875, for which plaintiff in error contends.

II

The record now before this court for review, presents a single proposition of law which may be summarized as follows:—

Is the claim of a settler under the preemption laws, whose settlement was made on July 22, 1883, subject to the right of way of a railroad

company claiming under the Act of March 3, 1875 whose road was not actually constructed or in operation as the date of settlement and whose "profile of road" was filed directly in the department of the Interior on January 26, 1883 and approved by the Secretary of the Interior on July 26, 1883: but which profile or plat was neither before or after approval filed in the local land office of the district of which the land lay until an indefinite time in August, 1883?

The facts of this case are more or less closely analogous to those of three other cases involving the construction of the Act of March 3, 1875, which have been before this court at different times.

Jamestown & Northern Ry. Co. vs. Jones; 177 U. S. 125.

Minneapolis, St. P. &Sault Ste. Marie Ry. Co vs. Doughty, 208 U. S. 251.

Stalker vs, Oregon Short Line Rd. Co. 225 U. S. 142.

A comparison of facts in the cases cited above, summarized as follows, serves to bring out such points of variance as exist.

In the Jones case the railroad company filed with the Secretary of the Interior a copy of its articles of incorporation and due proofs of its organization under the same on January 26, 1883. On the 13th of March, 1883, a profile or map of the line of definite location of the railroad company was filed with and approved by the Secretary of the Interior. Prior to this, however,

during the year 1882, the railroad was fully constructed upon the line shown by the plat and had been operated continuously from that time down to and after the date of approval of the plat.

Jones, a qualified pre-emptor, settled upon the land in controversy on February 23, 1883. He complied with the pre-emption laws with respect to residence, cultivation and proof thereof and received on May 26, 1893 a patent to the land in question without reservation of the right of way, which related back to the date of his settlement. Under these facts, this court held that the railroad company by actual construction and operation of its railroad, had given "unmistakable evidence and notice of appropriation" of a right of way across the land and that the possessory right of the settler was subject to the right of way claimed by the railroad company.

In the Doughty case, the railway company filed its articles of incorporation with due proofs of its organization under the same with the Secretary of the Interior on March 26, 1891, and the same was approved by the Secretary on April 15, 1891. In October, 1891, the Company made a preliminary survey of its proposed line of railway over the land in controversy, and prepared a map or profile of the survey which was approved by its board of directors and filed in the local land office of the district in which the land lay on July 20, 1892. This plat was forwarded to the Secretary of the Interior and approved by him on October 14, 1892. In July, 1892, the Railway Company constructed and commenced to operate its railway over the land in question.

Doughty made his filing under the homestead law, at the local land office on June 25, 1892, and made settlement and took up his residence on the land on July 1, 1892. At the time of his settlement, the line of the survey of the Railroad Company was marked upon the land by stakes driven into the ground 100 feet apart indicating the center of the railway to be constructed.

This court held that a line of railroad had not been definitely located on the land at the time of Doughty's settlement and that the failure to file its profile of survey in the local land office until 20 days after the date of Doughty's settlement, did not constitute compliance with section 4 of the Act of March 3, 1875. Consequently that the claim of right of way of the railway company was subject to that of the settler.

In the Stalker case a plat of survey of the railway company of station grounds, was filed in duplicate with the Register of the local land office on September 12, 1888. One of the duplicate copies was forwarded to the Secretary of the Interior on September 20, 1888, and approved by him on December 15, 1888. The other duplicate copy remained in the local land office but the register failed to note the same upon the plats in his office. The possessory claim of Stalker to the land in controversy was based upon settlement made by a qualified entryman on October 18, 1888, under the preemption law. There was no evi-

dence of the occupation by the railroad company of any portion of the land claimed as station grounds prior to the date of this settlement.

This court held tnat the railroad company by filing its plat in the local land office had "done everything that it was required by law to do" to fully comply with Section 4 of the Act of March 3, 1875; that the approval of its map of definite location by the Secretary of the Interior related back to September 12, 1888, the date of filing in the local land office; and that the claim of the settler was subject to that of the railroad company.

It will be observed from an examination of the cases cited above, that the closest analogy to the facts of the case at bar is found in the Doughty case. The points of similarity in detail are as follows:

(1) In both cases the railroad company bases its claim to the right of way upon compliance with section 4 of the Act of March 3, 1875.

(2) In both cases the "profile of road" or map of definite location was not filed in the land office of the district in which the land was situated until some 20 or 30 days after the entryman had made settlement.

(3) In both cases the line of railroad over the land in controversy was not completed by the laying of ties and rails or the operation of trains thereon until after settlement.

(4) In both cases the line of railroad across the land was completed and in full operation within something less than a month after the date of settlement.

(5) In both cases at the time of settlement, there was upon the land survey marks and other signs of intended occupation by the railroad company.

There is but one point of difference in the facts of the two cases, to-wit:— that in the case at bar a copy of the map of definite location was transmitted direct to the department of the Interior and approved on June 26, 1883, just 26 days before settlement. In the Doughty case the plat was transmitted to the department of the Interior from the local land office and was approved by the Secretary on October 14, 1892 or something over three months after settlement. There is also evidence to the effect that at the date of settlement the signs of intended occupation upon the lines of the survey made by the railroad company, were somewhat more conspicuous than in the Doughty case.

It is evident, we think, that under the facts of the case at bar the defendant in error cannot rely upon a perfected claim to a right of way across the land on the ground of actual construction and operation of its line of railroad prior to the date of settlement. In an opinion of the Supreme Court of North Dakota, in the Doughty case, it was held in language quoted and approved by this court, in its review of that record, that it is a necessary inference from the decision in the case of Jamestown & Northern Ry. Co. vs Jones that "actual construction is the only sufficient act other than compliance with section 4 to constitute a definite location." As actual con-

struction cannot be relied upon under the facts shown in this case, it necessarily follows that defendant in error depends upon the only other sufficient act that can constitute a definite location, to-wit:— compliance with section 4 of the Act of March 3, 1875.

As held by this court in its opinion in the Doughty case, "section 4 gives little play to construction or the analogies which the company invokes. That section determines the priority of rights between railroads and settlers by explicit language. A right of way is granted, but to secure it three things are necessary: (1) Location of the road: (2) filing a profile of it in the local land office: and (3) the approval thereof by the Secretary of the Interior, to be noted upon the plats in the local office. It is after these things are done that the statute fixes the right of the railroad and subjects the disposition of the land, under the land laws, to that right. 'And thereafter,' are the words of the statute, 'all such lands over which such right of way shall pass shall be disposed of subject to such right of way".

Of the three acts mentioned in this opinion as essential prerequisites to the acquisition of title to right of way under section 4, the defendant in error claims only to have performed two and insists that the performance of the other is unnecessary. It made a survey of its line of route and prepared a profile or map which was filed with the Secretary of the Interior and approved by him before the date of settlement. It entirely failed however, to file its map or profile in the local land office before the possessory rights of the settler had intervened. The State Supreme Court in its opinion, seems to adopt this theory of defendant in error as it holds that

under the facts found, the filing of the map in the local office either before or after its approval, was an entirely unnecessary act; that the approval of the Secretary of the Interior definitely fixed the location and entirely dispensed with the necessity of any notice to the settler. This holding it is respectfully submitted, entirely ignores not only the plain reading of section 4 of the Act of March 3, 1875, but also the ruling of this court in the Doughty case that, "that section determines the priority of rights between railroads and settlers by explicit language."

As held by the Circuit Court of Appeals of the 9th Circuit in a recent opinion, "Under Act 3, 1875, c. 152, sec. 4, 18 State, 483 (U. S. Comp. St. 1901, p. 1569), which provides that any railroad company desiring to secure right of way thereunder through public lands shall within 12 months after the location of any section of 20 miles of its road file with the register of the land office of the district a profile of its road, which, on its approval by the Secretary of the Interior, shall be noted upon the plats in said office, the filing and approval of such profile is an essential prerequisite to the acquisition of any such right of way."

United States v. Minidoka & S. W. R. Co., 111 C. C. A. 323; 190 Fed. 491.

And the same court in a later case, hold that "While the filing of proofs of organization authorizes the railroad company to locate its right of way over public lands, it acquires no particular route or right of way until it has either actually constructed its road or complied with section 4 in locating, filing, and having approved the profile of its right of way;" and quotes the case of Stalker vs. Oregon Short Line cited above as an authoriative ruling of this

court on the point of the three acts required of the railroad company when claiming grant of right of way upon compliance with section 4.

Chicago N. & St. P. Ry. Co. of Idaho vs U. S.
134 C. C. A. 84 at 92-93. 218 Fed. 288.

And the Supreme Court of Nebraska after a consideration and express reference to the Jones and Doughty cases and the application of the ruling contained therein to the case of a railroad company claiming a grant of right of way under the Act of March 3, 1875, uses the language, "Before the railroad company could acquire a right of way over the public lands, a map of its survey had to be approved by the Secretary of the Interior, and, before parties entering public lands could be in anywise affected by any claimed right of way, the approved map had to be returned and filed in the local land office."

Moran v. Chicago, B. &. Q. R. Co.
(Neb) 120 N. W. 192.

The view of the Nebraska court seems to be that the approval of the plat of definite location by the Secretary of the Interior operates to complete the grant only as against the United States; while the filing of the map in the local land office is necessary to advise intending settlers and to preclude the interposition of any possessory claim on their part.

And the Supreme Court of Arizona called to pass upon the same point, holds: "It appears to us that the act of Congress contemplates that for the acquisition of title by a railroad company, the company shall perform three acts: First, it shall file with the Secretary of the Interior a copy of its articles of incorporation and due

proofs of its organization, thus formally advising all persons interested and more particularly the grantor, the United States, that it proposes to avail itself of the grant; second, it shall locate its road; third, it shall file with the register of the land office for the district where the land is located a profile of its road and secure the approval thereof by the Secretary of the Interior, thus consummating the acquirement of legal title to the right of way."

Phoenix & E. R. Co. v. Arizona Eastern R. Co., (Ariz.) 84 Pac. 1097.

The fact that the filing of the plat of definite location in the local land office is an essential prerequisite to acquisition by a railroad company is not at variance with any authoritative ruling contained in the opinion in the case of Stalker vs Oregon Short Line. On the other hand the utterances of that opinion are on this point entirely consistent with the holdings of this court in the Doughty case.

As shown above, the railroad company in the Stalker case prepared its map of definite location in duplicate and filed one of these in the local land office of the district where the land was situated, before it was transmitted to the Secretary of the Interior. This plat was on file in the local land office long before settlement was made upon the land. The only feature in which it was claimed that the railroad had not complied with section 4 of the Act of March 3, 1875, was that after the approval of the map by the Secretary of the Interior, it was not noted upon the plats of the local land office. Such failure in performance of duty as had occurred, was that

only of the land officials in failing to do their part. In entire harmony with the principles governing such a state of fact, this court held that "the railroad company, having done everything which it was required by law to do, should not be affected by the negligence of the register in not doing a duty upon which the vesting of title as against the United States did not depend. If the taking effect of the grant had been made to depend upon his properly marking the plat books, there would be no room for the doctrine of relation to the initiatory step of filing the plat of selection. As that is not the case, his neglect to do something not vital to the vesting of title will not defeat the title so vested."

In another part of the opinion, in passing upon the importance of the filing of the map of definite location in the local land office whether the railroad company intends to claim right of way or station grounds, the court uses this language:—

"There can be no doubt that the provisions of the 4th section, for securing in advance of construction the benefits of the act, have application to the station grounds, as well as to the right of way proper. The "benefits" to be secured cover one as well as the other. *The prerequisite for securing either right, in advance, is the filing of a map of location*, whether it be for a right of way or for station grounds. But until approved the appropriation stands suspended." (Stalker case p 148). (Italics ours.)

The decision of the State Supreme Court seems to proceed upon the theory that partial compliance by the railroad company with the provisions of section 4 of Act of March 3, 1875, might be supplement to a degree at least, by "practical construction" of the railroad. It is

not believed that the decision of this court in the Jones case was intended to be so elastic as this. As shown in that case, this court held that "actual construction of the road is certainly unmistakable evidence and notice of appropriation." This ruling is made in reference to a line of railroad that had been fully constructed and in operation for months before the date of settlement. As stated in the opinion, this ruling "enables the railroad company to secure the grant by an actual construction of its road or in advance of construction by filing a map as provided in section 4." It gives no countenance to the proposition that notice to intending settlers may be given by partial or "practical construction" of a railroad and that the grant may then be completed by transmitting a map of definite location direct to the Secretary of the Interior and securing his approval without filing it in the local land office.

That notice to intending settlers is the purpose of section 4 of the Act of March 3, 1875, in requiring the filing in the local land office of a profile of the line of route of a railroad company who intends to secure right of way over the public lands in anticipation of the construction of its line of railroad, seems very clear. In 1883 at the time that the conflicting claims of plaintiff and defendant in error arise, there were great tracts of vacant public land from which the intending settler had a wide range of selection. While proximity to a line of railroad was desirable, to have its right of way upon a quarter section of

land, would greatly reduce the area and correspondingly the value of the land. Taking by way of illustration the facts of the case at bar, we find that by the acquisition of the railroad right of way the 160 acres of land entered by the devisor of plaintiff in error is reduced something over 12 acres, or about 8 per cent. It is quite evident, we think, that such reduction entirely off-sets the value of proximity and that no intending settler, if properly advised, would consent to such reduction in the area of his claim when it might be avoided by a change in location of 160 rods or less.

The provisions of section 4 of the Act of March 3, 1875, give to intending settlers constructive notice that in case the right of way of a railroad company is claimed across public lands, in anticipation of the construction of its road, a plat of the line of route will be filed in the local land office where it may be examined before settlement is made. If the railroad company may transmit its plat of definite location direct to the Secretary of the Interior and secure his approval without filing the map in the local land office, the settler is deprived of all benefit of notice intended for him by the Act.

If the Act does not by its terms require a filing in the local land office it is only necessary to carry the analogy a little further and conclude that a filing with and approval by the Secretary of the Interior may be dispensed with and that the intending settler will be required to take notice of the signs of any survey made upon the

ground by a railroad company. This theory is however, effectually disposed of by the holding of this court in the Doughty case, that stakes marking the line of a survey do not serve as evidence of appropriation. If survey-marks before approval of the map of definite location are without effect as notice, how can a partially constructed grade after an approval of which the settler is legally unadvised, perform this function to the full?

The proposition that the filing of the plat in the local land office is for the purpose of giving notice to settlers of an intended appropriation, receives strong countenance from the holding in the Jones case that "actual construction of the road (which serves only to take the place of the filing of the plat) is certainly unmistakable evidence and notice of appropriation;" and the reference in the Doughty case to "the essential difference (as notice) between a mere location movable at the will of the company, and the actual construction of the road necessarily fixing its position and consummating the purpose for which the grant of right of way is given."

The State Supreme Court in holding that "the entryman in this case can have no more ground for complaint that could the entryman in Stalker vs Oregon Short Line, supra" disregards the important consideration that the entryman in the Stalker case was given all the notice required by section 4 of the Act of March 3, 1875, at the time he made his entry upon the land. In emphasizing the effect as notice of a railroad

grade "which is only 18 days from physical completion," it also disregards the fact that the road surveyed across the land was no nearer in point of time to complete construction than that brought in question in the Doughty case.

It may also be remarked that the map of definite location in the Doughty case was filed only 20 days after settlement; yet this court gives no anticipatory value whatever to this short delay in the performance of the duty required of the railroad company. If the filing of a map of definite location in the local land office 20 days or even 3 days after settlement could not operate as notice of an intended appropriation, how could an unconstructed railroad the completion of which did not occur until 18 or 20 days later, serve the same function?

It is further submitted that the State Supreme Court indulged an erroneous view of the term "Fixity of location," when in its opinion, it held in speaking of the facts of the case at bar, "It is however, stronger than the Jamestown case on account of the fact that the plat had been approved at Washington and that the railway company was then powerless to change the location. There can be no doubt indeed that the route was fixed both on account of the physical construction and the difficulty of a subsequent removal, and on account that its offer of a permanent location had been accepted by the Federal authorities." (126).

The evident theory of this holding is, that a right of way claimed under the Act of March 3, 1875, becomes as permanently and immovably fixed by an approval of the map of definite location by the Secretary of the Interior even without the formality of filing the same in the local land office, as it does by actual construction and operation of the road.

That such view is fallacy is shown by an examination of an Idaho case passed upon first by the Circuit Court of Appeals for the 9th Circuit and afterward by this court. By the finding made in the district court of the First Judicial District of the Territory of Idaho, it appeared: "That on the the 9th day of November, 1886, the defendant the Coeur d'Alene Railway and Navigation Company filed in the United States land office at Coeur d'Alene, Idaho, a map or profile of that portion of its railroad running through the town of Wallace, which was approved by the Secretary of the Interior December 3, 1886, and that upon said map or profile said line B, through said town of Wallace, was platted as the line of route of said road; that line C was in fact and intended to be a definite line of location thereof, but that said line B was so platted by a mistake, and that said mistake was not discovered until after the completion of said railroad and side track and depot upon and over the ground in controversy herein; and that the filing of said plat, showing said road to run over said line B, was not done for the purpose of in any manner deceiving the plaintiff or any one else, but was done by a mistake, as aforesaid; and that the plaintiff was not in any manner misled or prejudiced by the filing of said plat or by said mistake."

The Circuit Court of Appeals in reviewing the record of this action, held: "We find no warrant in the act for saying that a railroad company,

having adopted one line of survey along the route provided for in its articles of incorporation, and having filed the plat thereof, may not subsequently, and within the time allowed it by law for so doing, adopt another route, and no reason is apparent why, instead of filing a second plat, it may not construct its road on the line surveyed and adopted, so long as the rights of others have not intervened."

Washington & I. R. Co. v. Coeur D'Alene Ry. & Nav. Co., 60 Fed., 981.

Upon a review of the judgment of the Circuit Court of Appeals, in this court, it was held: "We agree with the Circuit Court of Appeals in thinking that, so far as the United States are concerned, there is nothing in the act forbidding a railroad company, having adopted one line of survey along the route provided for in its articles of incorperation, and having filed a plat thereof, to subsequently, and within the time allowed it by law for so doing, adopt another route; and that no reason is apparent why, instead of filing a second plat, it may not construct the road on the line surveyed and adopted, so long as the rights of others have not intervened."

Washington & I. R. Co. v. Couer D'Alene Ry. & Nav. Co., 160 U. S., 77.

It seems clearly apparent from this ruling, that the approval of a map of definite location by the Secretary of the Interior does not give immovable fixity to the line of route even against the railroad company; but that it may actually after such approval, construct its line upon another route over the public lands (provided the rights of others have not intervened). Of all possible rights that might intervene however, it is submitted those of a settler upon the public lands without notice of the change in route, is the most important.

It is respectfully submitted that the opinion in the Stalker case is not intended to apply to a state of fact analogous to that of the case at bar; and that the Stalker case cannot serve as authority for a holding that a railroad company, claiming against a settler on the ground of legal compliance with the requirements of Section 4, Act of March 3, 1875, may dispense with the filing of its plat of definite location in the local land office. This case it is believed, will be ruled by the holdings of the Doughty case with which it is so closely analogous in fact.

Assuming therefore, as held by this court in the Doughty case, that filing of the map of definite location in the local land office is one of the three essential prerequisites to a grant of right way under the Act of March 3, 1875, the defendant in error has failed to support its claim for the reasons:

(1) It has not complied with section 4 of the Act of March 3, 1875, in that it wholly failed to give notice of its intended appropriation of right of way to a settler upon the land.

(2) It had not at the date of settlement, completed "actual construction" of its railroad, which is declared to be "the only act other than compliance with section 4, to constitute a definite location."

The term "actual construction" as used in the Jones case, is evidently an equivalent of the expression "necessarily fixing its position and consummating the purpose for which the grant

of a right of way was given," appearing at the close of the opinion in the Doughty case. The consummation of the purpose for which the grant of right of way was given, is unquestionably the *complete* construction of a railroad. Or in another sense, it may be expressed as the whole of which surveys, ditching, bridging, grading, leveling, the laying of rails and ties and placing of rolling stock thereon are but integral parts. The railroad is therefore, "actually constructed" when it becomes a railroad; and a railroad as defined by standard authority, is "1. "A graded road having one or more tracks usually of metal rails supported by sleepers and designed for the passage of rolling stock. 2. The whole system of tracks, stations, rolling stock and machinery used in transportation by rail." Standard Dictionary

"A permanent road or way having a line or lines of rails fixed to ties or sleepers and laid to guage usually on a leveled or graded ballasted road or roadbed, providing a track for freight cars, passenger cars or coaches and other rolling stock designed to be drawn by locomotives or sometimes propelled by self contained motors; hence such a road or line together with all the lands, buildings, rolling stock, franchises and other assets pertaining thereto and constituting a single property."

Webster's New International Dictionary."

That a graded roadbed in any stage of construction prior to the laying of rails and ties, does not come within these definitions is apparent at a glance. Yet a railroad actually constructed and in operation is the only alternative means of notice to the settler that can take the place of full compliance with the three essential duties mentioned in section 4 of the Act of March 3, 1875.

As the railroad of defendant in error had not under any view of the facts, reached this stage of construction at the time of Mr. Barlow's settlement, and as the plat of the line of route had not been filed in the local land office, he had no notice whatever of the pendency of a proceeding before the Secretary of the Interior, which led to the approval of the line of route. Neither he nor his devisee is therefore, bound by the Act of approval and may claim under his patent, rights upon the land superior to those of the railroad company.

It is therefore, respectfully submitted that the judgment of the Supreme Court of North Dakota, should be reversed and a decree entered quieting title to the land in controversy against the claims of defendant in error.

JOHN KNAUF,
S. E. ELLSWORTH,
Counsel for Plaintiff in Error.

Office Supreme Court, U. S.
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Supreme Court of the United States

OCTOBER TERM, 1915.

No. 257.

HARRIET A. BARLOW,
Plaintiff in Error,

vs.

NORTHERN PACIFIC RAILWAY COMPANY.

BRIEF FOR DEFENDANT IN ERROR.

CHARLES W. BUNN,
EMERSON HADLEY.

Supreme Court of the United States

OCTOBER TERM, 1915.

No. 257.

HARRIET A. BARLOW,

Plaintiff in Error,

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NORTHERN PACIFIC RAILWAY COMPANY,

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT.

This is a writ of error to the Supreme Court of North Dakota to review the judgment of that court entered September 9, 1913, printed p. 108 Transcript, this judgment affirming the judgment of the state district court for Foster County, printed p. 60 Transcript, which confirms and quiets the railway company's title to a right of way 200 feet wide 100 feet on each side of its railway through a quarter section of land which, except the right of way, belongs to plaintiff in error.

In the state supreme court an interlocutory appeal was prosecuted from an order on motion to correct findings. The proceedings in the interlocutory appeal are immaterial here and should be disregarded. They are included in the Transcript between heading "Order to Show Cause," p. 60, and p. 102, inclusive. The interlocutory appeal is reported as *Northern Pacific v. Barlow*, 20 N. D. 197. The findings control and upon them the case must be presented here. The findings were by the court, a jury having been waived, and are in the printed Transcript pp. 53-59.

Defendant in error, who was plaintiff in the state court, alleged title to right of way under the Act of Congress of March 3, 1875 (18 Stat. 482). The findings establish:

> Defendant in error is the successor of Jamestown & Northern Railroad Company, which was a railroad company incorporated under the laws of the Territory of Dakota and chartered to build a railroad from Jamestown to Devils Lake. The Jamestown & Northern, commencing on the first day of September and completing on the 30th day of October, 1881, surveyed its route, which crossed the quarter section now claimed by plaintiff in error. A map or plat representing this survey was made and on the 5th of October, 1882, was adopted by resolution of the board of directors. Thereafter on January 6, 1883, the Jamestown & Northern filed with the Secretary of the Interior copy of its articles of incorporation and proofs of its organization.
>
> December 30, 1882, a map of definite location of the railroad was prepared, which map with accompanying affidavits and certificates was filed with the Secretary of the Interior and by him approved June 26, 1883. It was filed in the Land Office at Fargo some time during August, 1883 (Trans. pp. 55-56).

The grade of the railroad had been completed by the Jamestown & Northern across the premises prior to May 31, 1883. (Trans. p. 59.) The rails were laid between August 10 and 15, 1883 (Trans. p. 124), and operation of the railway commenced soon after and has been continued ever since; this apparently without any objection from Barlow who lived on the premises up to 1901. (Trans. pp. 124, 126.)

On and prior to the 22nd day of July, 1883, the land in controversy was unsurveyed. On this 22nd day of July, Frederick G. Barlow established his residence on the quarter section, intending to make entry under the preemption laws when the land should be surveyed. At this time no railroad track was laid and no line of railroad was in operation nor had any map thereof been filed in the United States district Land Office at Fargo. (Trans. p. 57.) After the survey Barlow completed his preemption entry, alleging settlement on the 22nd day of July, and subsequently received a patent from the United States. (Trans. p. 58.) Barlow died in about 1901. Up to his death apparently no controversy had arisen between him and the railway company. Plaintiff in error is his widow and sole heir and devisee and is invested with all the title Barlow had. (Trans. p. 58.)

The United States survey was completed and filed in the local Land Office at some time within the ninety days just prior to October 8, 1884. (Trans. p. 58.)

The brief of plaintiff in error, on pages 8 and 20, states the date of approval of the railway map by the Secretary of the Interior as *July 26*, 1883. This is doubtless an inadvertence, as the correct date is *June 26*. (See findings, Trans. p. 56; opinion of the state supreme court, Trans. p. 123.)

Plaintiff in error on p. 16 of brief asks this court to go into the testimony on which is based the finding of the state court that the railroad grade was completed before May 31, 1883, and to reverse that finding. To this there are several good objections: (a) that no such assignment of error is contained in the record or brief; (b) that the great weight of testimony supports the finding (see Trans. pp. 24, 30, 33, 36, 39 and 40); (c) that, conceding the power of this court, it is a power seldom exercised and ordinarily the findings of the state court will not be reviewed on the question of mere weight of evidence. *Interstate Amusement Co. v. Albert*, in this court January 10, 1916, and cases cited.

ARGUMENT.

1. *Defendant in error perfected its title to right of way by construction regardless of filing a map.*

The first section of the Act of March 3, 1875 (18 Stat. 482) says nothing about a map. It grants *in praesenti* to any railroad company organized under the laws of any state or territory, which has filed with the Secretary of the Interior a copy of its articles of incorporation and due proofs of its organization, a right of way to the extent of 100 feet on either side of the central line of its road. It is not now open to doubt that by construction through public lands without filing a map a railroad company acquires the specified right of way, provided it files with the Secretary a copy of articles and due proofs of organization. Its filing of articles and proofs makes it a grantee of the United States as if specifically named in the act

of Congress. We contend that *Jamestown & Northern Railway Company v. Jones*, 177 U. S. 125, settles this doctrine. That decision shows, moreover, that the same doctrine has been held uniformly in the Interior Department. A similar ruling was made in *Washington & Idaho Railroad v. Coeur D'Alene Railway*, 160 U. S. 77, 97. In the case now here the railway company had completed its grade nearly two months before Barlow made his settlement and initiated his rights. Long before that the company had made a map and by resolution of its board of directors had adopted as its definite and final location the line which actual construction followed. The company, therefore, by every possible corporate action had fixed the location of its line and had made a large part—probably the major part—of the expenditure necessary for construction.

It had placed across the land an embankment and level grade obviously for a railway and for no other use and followed this up in August of the same summer by laying rails and commencing operation. When Barlow came to the land he could not fail to see and to know that a railway had been definitely and finally located across it and had been constructed nearly to completion; and, moreover, at that time the railway company's line was definitely fixed by resolution of its board of directors and by the substantial construction then done.

In the case of *Minneapolis, etc., Ry. Co. v. Doughty*, 208 U. S. 251, the railway company had not commenced construction. It had only adopted a route marked by stakes in the ground 100 feet apart indicating the center of the roadway to be built. Such driving of stakes in the first place did not tie the hands of the railway company as between it and the United

States and did not prevent the company from changing its route and acquiring through the public lands right of way on a different route (*Washington & Idaho Railroad v. Coeur D'Alene Railway*, 160 U. S. 77, 97; *Stalker v. Oregon Short Line*, 225 U. S. 142, 150) and in the second place was not, as regards the pre-emptor, such an open, notorious and final assertion of possession and right as in justice to him ought to be required. But here, by what the railway company had done, it had definitely fixed its right of way so that it could not change as between it and the government; and while its road was not in actual operation its actual construction had so far progressed that any settler had fair and full notice of the railway company's possession and rights. The case, therefore, we submit falls under *Jamestown & Northern Railway v. Jones* rather than under *Minneapolis, etc., Ry. Co. v. Doughty*.

And we submit that *Railway Company v. Alling*, 99 U. S. 463, is a decision on the very point. The question there was of priority between two conflicting railways, and priority was held to be established in favor of the Denver Company by occupancy for and *commencement* of construction. The court said in that case, p. 478, in speaking of the Denver Company's rights: "Its surveys of 1871-72, followed by an occupancy of the canyon on the 19th of April, 1878, in advance of the Canyon City Company, for the purpose of constructing its road through that defile, was, in our judgment, a final appropriation of the way granted by Congress." The court in that case drew the distinction between mere location surveys and actual commencement of construction, holding, as was held afterward in *Minneapolis, etc., Co. v. Doughty*, that mere surveys give no right; but that surveys fol-

lowed by actual occupation and commencement of construction work are a final appropriation of the right of way. The construction work in that case was in much earlier stages than in this, at the time of alleged attachment of adverse rights. And while the Denver Company was a named grantee in an Act of Congress a company filing with the Secretary its articles and proofs of organization becomes specifically a grantee as if named in the Act of 1875. *Minneapolis, etc., Co. v. Doughty*, on p. 258.

2. *The Map.*

A map as has been shown is not necessary to acquisition of title under Section 1 by construction The only reference in the Act of Congress to a map is in Section 4 and this section provides a way by which a railroad company in advance of construction may preempt a right of way. The language of this section is that any railroad company to secure the benefits of the act shall file its map in the District Land Office within twelve months after location if upon surveyed lands, *but if upon unsurveyed lands within twelve months after the United States survey thereof.*

We wish to point out what does not seem to have been suggested to the court below, that clearly this Act contains no authority to file a map on unsurveyed lands and thereby to secure any rights therein. The reason of this seems quite obvious: it is wholly impossible to show surveyed sections in a map of unsurveyed country and therefore wholly impossible to tell where a line of railway will cross sections not yet identified. As appears from decisions of the Secretary of the Interior, his department has uniformly held any right of way map filed before survey to confer no rights

whatsoever; and that such maps as have been received before survey are received for purposes of information merely. Secretary Teller in *Utah & Wyoming R. R. Co.*, 1 L. D. 397; Secretary Noble in 14 L. D. 336 and in *Tintic Range Ry. Co.*, 15 L. D. 88; Secretary Hitchcock in *Utah & California R. R. Co.*, 30 L. D. 591. These decisions make it clearly appear that the Jamestown & Northern had no right before building or while building to file in the Land Office any map to secure rights under the Act of Congress; for the public surveys were not made until a year later. This is probably why the company filed no map in the local Land Office at Fargo. The map which it filed with the Secretary was for purposes of information only and the description of that map given in the third finding (Trans. p. 54) shows that it contained no data from which the right of way could be surveyed or identified.

Therefore the map spoken of in the findings, which was approved by the Secretary June 26, 1883, but not filed in the Fargo Land Office until some time in the following August, is utterly immaterial to either party's title or right.

But if the railway company before and while it was building in 1882-3 could not initiate any right by filing a map, because the surveys were not made, this greatly strengthens the contention that it could acquire rights under Section 1 by taking possession and *commencing* construction.

The argument of Secretary Vilas in *Dakota Central R. R. Co. v. Downey*, 8 L. D. 115, approved by this court in *Jamestown & Northern v. Jones*, was that in unsurveyed country, because right of way could not be secured by map (the Act undoubtedly contemplating appropriations in unsurveyed country) the conclusion

was forced that a railroad company must be held able to acquire title under Section 1 by occupation and construction; because if having constructed, its rights were to be referred to a profile to be filed within twelve months after the survey, it would lose its location, railway and improvements to any claimant under the land laws who might make at the Land Office an entry or application before its map was filed; that therefore any other interpretation would deny to railway companies the benefit of the Act in unsurveyed territory.

The same reasoning drives us to the conclusion that actual possession and *commencement* of construction attaches a right in favor of the railway company, as held in *Railway Company v. Alling;* and that this attachment of right cannot be postponed to the laying of rails or to movement thereon of trains, because under that doctrine a railway company could originate no rights in unsurveyed lands until its whole investment was completed; and if only 90 per cent. completed its investment and location would be wholly lost to a settler or entryman then originating a claim.

The plaintiff in error has no special equities. The remark of the Supreme Court of North Dakota that Barlow was not by failure to file a plat in the local Land Office induced to settle on land he would not otherwise have taken and that doubtless the location of the road increased the value of his land rather than otherwise has the indorsement of this court. *R. R. Co. v. Baldwin,* 103 U. S. 426, 430. And one cannot fail to note, as the Supreme Court of North Dakota said in its opinion, that Barlow, the entryman, lived on the land for many years in apparent peace with the railway company, a nearby station being named for him, the controversy here not arising until after his death.

The Land Department never has regarded it as essential to describe in patents to settlers and except out of the conveyed land railroad right of way, *Ex parte Arnett*, 20 L. D. 131; *Dunlap v. Shingle Springs Ry.*, 23 L. D. 67; and it is elementary that one who buys from the government is not a *bona fide* purchaser and gets no better title than his grantor.

CHARLES W. BUNN,
EMERSON HADLEY.

BARLOW *v.* NORTHERN PACIFIC RAILWAY COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF NORTH DAKOTA.

No. 257. Argued March 3, 1916.—Decided April 3, 1916.

Under the Right of Way Act of March 3, 1875, c. 152, 18 Stat. 482, the rights of a railroad company entitled to the benefit of the act are paramount over those of a homestead entryman holding a patent of the United States in consequence of rights initiated after the line was in course of construction, but before the map of the right of way had been filed in local land office. *Jamestown & Northern R. R.* v. *Jones*, 177 U. S. 125, followed and *Minn., St. Paul &c. Ry.* v. *Doughty*, 208 U. S. 251, distinguished.
26 N. Dak. 159, affirmed.

THE facts, which involve the rights of a railroad company under the Right of Way Act of 1875 and of an entryman under the Homestead Act, are stated in the opinion.

Mr. S. E. Ellsworth, with whom *Mr. John Knauf* was on the brief, for plaintiff in error.

Mr. Charles Donnelly, with whom *Mr. Charles W. Bunn* and *Mr. Emerson Hadley* were on the brief, for defendant in error.

MR. CHIEF JUSTICE WHITE delivered the opinion of the court.

In *Jamestown & Northern R. R.* v. *Jones*, 177 U. S. 125, there came under consideration the construction of the act of Congress of March 3, 1875, entitled "An act granting to railroads the right of way through the public lands

of the United States," c. 152, 18 Stat. 482. The case involved a controversy between the railroad which was entitled to the benefit of the act and Jones, a homestead entryman holding a patent of the United States in consequence of rights initiated after the railroad had constructed its line but before it had filed a map of its right of way in the appropriate local land office. The railroad claimed that its right of way across the land covered by Jones' patent was paramount and Jones asserted that his right under the patent was dominant. Giving sanction to a previous course of administrative construction dealing with unsurveyed public land, it was held that an appropriation of the right of way by a construction of the road under the statute gave the railroad the paramount right and that the provision of the statute concerning the filing of a map and profile in the local land office was intended not to deprive of the power to fix and secure the right of way by construction in advance of filing such map and profile, but simply to afford the means of securing the right of way in advance of construction. The two methods of securing the right, the one by construction of the road, and the other in anticipation of construction by filing a map, were decided to in no wise conflict the one with the other as both afforded a means of securing the right which the statute gave. The opinion pointed out that although the previous administrative rulings were concerned only with unsurveyed lands, they were equally applicable under the statute to surveyed lands, and it was thus concluded, p. 132: "It follows from these views that the grant to plaintiff in error (the railroad company) by the act of 1875 became definitely fixed by the actual construction of its road, and that the entry of the defendant in error (Jones) was subject thereto."

In *Minneapolis, St. Paul, &c. Ry.* v. *Doughty*, 208 U. S. 251, the controversy was between the Railway Company and a settler holding a patent of the United

States whose right had been initiated before the construction of the railroad but after a preliminary survey which had been made by the railroad as a means of ultimately determining upon what line it would build its road, the stakes of such survey being, at the time the settler initiated his right, across the land in question. The claim of the settler was that a mere entry of the railroad for the purpose stated was not a construction within the meaning of the *Jones Case*, while that of the railroad was "that an entry upon the land to locate the road is as necessary as an entry on the land to build the road, and, being there, the railroad could not become a trespasser, either as to the government or as to the plaintiff." It was decided that as a mere preliminary step for the purpose of determining where the road should be located was not in and of itself the equivalent of a definite location of the line and a permanent appropriation of the right of way, the case was not covered by the rule of the *Jones Case* and the right of the settler was paramount.

Which of these rulings is here controlling is the single question arising for decision on this record, as will be at once seen by the following statement of the case:

The suit was commenced by the railroad to quiet its title to its right of way across a quarter-section of land which had been patented by the United States to the defendant. The latter not only by answer, but by counterclaim asserted the paramount nature of his right. The court below, affirming the action of the trial court, held that the rights of the railroad were paramount upon the conclusion that the facts found clearly brought the case within the rule established in the *Jones Case*. (26 N. Dak. 159.) The facts as thus established were these, p. 161:

"On the said 22d day of July A. D. 1883, intending to make entry of the said land therein described when the same was surveyed, and to acquire title to the same by

virtue of the compliance with the preëmption laws of the United States, said Frederick G. Barlow [the predecessor in title of the plaintiff in error] settled upon said land and took up his residence thereon. At the time of such settlement there was not a railroad track or line of railroad in operation across said land at any place, nor had plat or profile of the section of railroad extending across such land hereinbefore referred to been filed in the United States District Land Office at Fargo. We find from the evidence that, although Barlow entered upon the land upon the 22d day of July, A. D. 1883, the grading of the road across said land was completed prior to May 31st, 1883; that is to say, nearly two months before his settlement. We also find the rails were laid upon the grade between August 10th and 15th, 1883, and that trains were operated on said road and across said land soon after."

That under these facts the court below was right in holding that the controversy was foreclosed by the ruling in the *Jones Case* we think is too clear for anything but statement. The contention that the case is controlled by the *Doughty* and not the *Jones Case* because the road was not complete and operating when the entryman initiated his rights although it was then graded and was virtually ready for the ties and rails, if acceded to, would render the statute inefficacious and dominate the substance of things by the mere shadow. The first, because as it is impossible to conceive of the completion of the road by the placing of ties and the laying of rails without presupposing the prior doing of the work of grading, it would follow that the recognition of the right of an entryman to appropriate adversely to the railroad after the grading had been done and before the laying of the ties and rails would render the performance of the latter useless and would deprive the railroad therefore of all practical power to appropriate. The second, because as pointed out in *Stalker* v. *Oregon*

Short Line, 225 U. S. 142, the decision in the *Jones Case* rested not upon the ground that the work of construction had reached the absolutely completed stage so as to enable the road to be operated, but on the fact that the work was of such a character as to manifest that the railroad company had exercised its judgment as to where its line was to be established and had done such work of construction as "necessarily fixes the position of the route and consummates the purpose for which the grant of a right of way is given" (p. 150). And it is obvious that this standard when complied with would serve not only to demonstrate the fixed intention of the railroad to appropriate, but also to give tangible and indubitable evidence to others of the right of way appropriated, thus preventing injury to innocent persons which might result from their selection of land in ignorance of the fact of its prior appropriation. The distinction between the doctrine of the *Jones Case* and that of the *Doughty Case* is therefore that which necessarily must obtain between permanent work of construction of a railroad on a line definitely selected and fixed by it, and mere tentative work of surveying done by a railroad for the purpose of enabling the line which it was proposed to construct to be ultimately selected. The broad distinction between this case and the *Doughty Case* both as to the fundamental rights given by the statute and the protection to innocent parties was thus lucidly pointed out by the court below in its opinion:

"There can be no doubt, indeed, that the route was fixed, both on account of the physical construction and the difficulty of a subsequent removal, ... The entryman in this case can have no more ground for complaint than could the entryman in the case of *Stalker* v. *Oregon Short Line*, *supra*. It would be absurd to hold that one who enters upon land and sees upon it a railroad grade which is only 18 days from physical completion, and, as we have a right to believe, but a link in miles of

road stretching across the same prairie, was not aware of this prior railroad occupation."

We have not stopped to consider an intimation contained in the argument that the court erred in its finding of fact as to the state of construction of the road at the time the entry by Barlow was made, because without at all questioning our power to review the facts in so far as necessary to dispose of the Federal contention, we consider the suggestion wholly without merit, first, because we would not in any event disregard the finding of fact of the court below except upon conviction of clear error committed, for which the record here affords no ground whatever; and second, because as the finding of the court below was also the finding of the trial court, the request invites us to disregard the findings of both courts on a matter of fact in the absence of any ground for a conviction that error of fact was clearly committed.

Affirmed.